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Disruption and Deference

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DISRUPTION AND DEFERENCE

OLIVIER SYLVAIN*

ABSTRACT

Online video streaming applications enable users to watch over-the-air broadcast programs at any time and almost on any device. As such, they challenge the pertinence of traditional video distribution law and the broadcast network system on which it is based. Congress enacted the Transmit Clause of the 1976 Copyright Act to resolve the high-stakes tussle between broadcasters and cable providers. But, today, that provision is ill-suited to resolving whether unauthorized streaming infringes on broadcasters' copyright to perform works publicly. Its scope is ambiguous enough that judges across the country were notably divided on whether it reaches online video distribution—that is, until the Supreme Court ruled that it does in a divided opinion last term in ABC v. Aereo.

Remarkably, none of the courts to address the question, including the Supreme Court, consulted the interpretations of video distribution law by the agencies to which Congress delegated the broad authority of doing so in closely related statutes. The courts

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assumed that they alone should interpret the scope of the Transmit Clause in the absence of a specific delegation from Congress to an agency to interpret the provision.

This Article argues that courts instead should consult all of the public law that Congress set in motion in the area of video distribution law before resolving novel disputes over the scope of the Transmit Clause. This reform would have purchase when, as is the case today, the Copyright Office and the Federal Communications Commission have authority to interpret online video distribution under the Copyright Act and the Communications Act, respectively. Although neither agency has the authority to interpret the Transmit Clause, current administrative law doctrine suggests that those agencies' interpretations of closely related statutes are worthy of respect, if not deference. This Article accordingly argues for a more careful approach to substantive judicial review in this area than the courts have employed.

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INTRODUCTION

Today's popular retail internet applications are completely different from the mass market communication technologies that preceded them. Twentieth century broadcasting empowered audiences to tune in together to live and recorded performances. It dramatically enlarged the size of audiences that could experience live and recorded programming simultaneously. Broadcast television in this regard was the great hearth of American culture for most of the twentieth century.¹ The major networks were to be the trustees of the public airwaves that curated every minute of programming for the mass public in order to keep viewers interested.

As transformative as broadcasting was, however, the Internet has turned the political economy and cultural practices of video distribution inside out. Today, audiences are not so beholden to broadcast programmers. Current video distribution technologies have unmoored performance from time and place so that each viewer is in far more control over when and how she watches television programs than she was before. Viewers can now experience performances at the time and in the order of their choosing on almost whatever networked device they wish.

With so much in flux, after years at the center of the mass communication political economy, the broadcast incumbents today act as though they have everything to lose. They have done almost everything in their power to moderate the disruptive effects of online video distribution.

One of the primary resources to which they have turned to retain their market position is public law. They have done so in at least three ways. First, they have lobbied Congress to enact statutes or amend existing ones to account for new technologies as they emerge. Congress accordingly has added new exclusive copyrights and amended the scope of existing ones with specific technologies in mind. Second, the incumbents have petitioned the pertinent administrative agencies to adopt interpretations of existing law that further secure their market position. Pursuant to their delegated authority under the Copyright Act and the Communications Act, respectively, the Copyright Office and the Federal Communications Commission ("FCC")

1. See SUSAN J. DOUGLAS, *LISTENING IN: RADIO AND THE AMERICAN IMAGINATION* (2004); J. FRED MACDONALD, *ONE NATION UNDER TELEVISION: THE RISE AND DECLINE OF NETWORK TV* (1993).

routinely hear such petitions and comments in proceedings involving novel communications technologies. Third, the incumbents have challenged the emergent technologies in court, relying on interpretations of existing law that inure to their benefit. It is to this strategy—appeal to courts—on which I focus in this Article. The majority and dissenting opinions in the United States Supreme Court’s *American Broadcasting Companies v. Aereo, Inc.*² decision from this past June provide an important opportunity to assess how courts might address technological novelty in the absence of clarity in existing public law. There, broadcasters argued that an upstart online video distributor infringed on their copyright to “perform” works “publicly” when it made broadcasters’ programs available without authorization. The Court agreed with broadcasters.

Rather than focus on the substantive outcome of the litigation, I focus here on the interpretive strategies that the courts (the majority and dissenting opinions in *Aereo* in particular) have employed to make sense of the Transmit Clause,³ a provision that Congress wrote well before any of its members knew anything about networked communications, let alone online video streaming. Judges, I will show, were silent on efforts by the Copyright Office and the FCC to make sense of online video streaming in proceedings involving related provisions in the Copyright Act and the Communications Act. They assumed that courts alone could or should make sense of a statutory provision absent a specific delegation to the agencies to interpret the provision.

The courts’ silence is remarkable at least because judges have long recognized that they are not always good at making legal sense of disruptive communication technologies. To be sure, sometimes they can, should, and do define legal obligations and rights in the first instance, without consulting other institutions. Adjudications concerning the scope of individual constitutional rights like privacy or fact-dependent considerations like copyright fair use, for example, are the province of the courts.⁴ Judges in these cases are not and should not be any more reticent to resolve disputes involving disruptive technologies than they are for conventional ones.

In other legislative fields, however, courts are careful not to impose their interpretations of existing statutes without first consulting institutions created for that very purpose. Scholars generally associate this reticence

2. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

3. 17 U.S.C. § 101(2) (2012).

4. It is worth noting here that, although fair use is explicitly defined in the Copyright Act, observers have generally recognized it to be a judge-created doctrine that is only really elaborated in adjudication. I discuss the fair use doctrine below. *See infra* notes 277–281 and accompanying text.

with deference.⁵ Deference has a special meaning in administrative law doctrine, referring generally to courts' relative high regard for agency conclusions.⁶ For constitutional law and legal process scholars, the concept of deference is a trans-substantive idea that connotes respect for the formal authority or decisionmaking capacity of other institutions.⁷

In both kinds of cases—those where they decide in the first instance without consulting other institutions and those in which they actively defer to agencies—courts are almost always explicitly mindful of the limits of their institutional authority and capacity to resolve disputes involving novel communication technologies. I argue here that, in the recent online video distribution cases on the scope of the Transmit Clause, courts should have been far more respectful than they were of recent and ongoing proceedings at the Copyright Office and the FCC on how to treat those technologies under sister provisions in the Copyright Act and the Communications Act.

Courts, as it turns out, are not the only ones that jump the gun to resolve substantive policy disputes. Legal commentators, too, have sometimes been far too eager to determine what the “proper balance” between content owners, innovators, and users ought to be.⁸ To be sure, some information law scholars have remarked on the relative institutional roles that legislatures, agencies, and courts play in resolving disputes involving networked communications.⁹ But scholars have avoided or been silent on the point in the context of video distribution.

5. See generally LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACT* 320 (1965).

6. See, e.g., *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

7. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 765–66 (1997); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032–33 (2011); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483 (2010) (referring to the “ordinary” components of administrative law as “statutory and regulatory requirements, such as the Administrative Procedure Act (APA) or Executive Order 12,866 and associated administrative law doctrines”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

8. See, e.g., Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?*, 59 J. COPYRIGHT SOC'Y U.S.A. 627, 631 (2012); Sebastian Wyatt Novak, Note, “A Million Little Antennas:” *The Second Circuit's Decision in WNET, Thirteen v. Aereo, Inc., and the Next Great United States Supreme Court Copyright Battle*, 16 TUL. J. TECH. & INTELL. PROP. 287 (2013).

9. See, e.g., Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (using the theory of economic externalities to posit a theory of IP property rights distribution); Thomas Fetzner & Christopher S. Yoo, *New Technologies and Constitutional Law*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 485 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013); Susan Freiwald, *First Principles of Communications Privacy*, 2007

The problem with this myopic focus on substantive policy outcomes is that it has a very narrow view of what the Internet is. I assume here that it is far more than an innovation machine.¹⁰ The Internet constitutes and inhabits all aspects of our public and private lives. Parties accordingly are now more than ever asking courts to resolve high-stakes disputes like those at issue in the *Aereo* litigation because innovation is an indeterminate objective. What is more, these disputes involve competing public policy priorities and interests for which there is often no easy answer in existing law. The focus on substantive policy outcomes accordingly ignores the far more relevant question today of how to make legal sense of laws when novel communication technologies like live video streaming emerge and the pertinent existing public laws provide no clear answer. I propose here a reform that would have courts leave these problems to Congress and the agencies to whom it has delegated the responsibility of resolving such questions in the first instance. This Article considers the recent video distribution cases and *Aereo* in particular to explain the point.

This Article proceeds in three parts. In Part I, I illustrate that, in the recent online streaming video cases, courts proceeded in their analysis of the public performance right on the assumption that they are best situated to resolve questions about novel technologies. I focus in particular on the recent litigation involving *Aereo*.

In Part II, I situate the Transmit Clause in its historical and legislative context. I show that it was just one part of a broader reform addressed to the emergence of cable television and the consequent shift in the political economy of broadcast programming distribution. I also show that Congress later amended the Copyright Act as well as the Communications Act to account for the emergence of disruptive video programming distribution technologies. And while it has incorporated the Internet and networked communications technologies in these amendments, I show that Congress has yet to amend the scope of broadcast transmission law to include the Internet. Instead, Congress has deferred that responsibility to the Copyright Office and the FCC. And, accordingly, both agencies have had a thing or two to say about broadcasters' relative rights in the market for online video dis-

STAN. TECH. L. REV. 3, at ¶ 30 (2007); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805–06, 855 (2004); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 96 (2010); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 751 (2005); Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822 (2001); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164 (2004); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009).

10. Cf. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. (forthcoming 2015).

tribution.¹¹ These agency findings, I argue, should make courts far more sanguine than they have been about deciding the scope of the public performance right *de novo*, as though they are the only act in town.

In Part III, I demonstrate that courts already have developed an appreciation for the limits of their relative institutional authority and capacity in other information law subfields like electronic communication surveillance and broadband network management. This underscores the inadequacy of the courts' approach to the public performance right. Thus, later in Part III, I propose that courts interpose interpretations by the Copyright Office and the FCC concerning the proper legal treatment of online video streaming under the sister provisions of the Copyright Act and the Communications Act. That is, I propose that courts defer to those agencies' conclusions as they would to agencies that have the specific delegated authority to interpret statutes in the first instance. In the end, my argument here is for more humility in courts' consideration of disputes concerning disruptive video distribution technologies than they have evinced to this point.

I. AEREO AND THE CASE OF ONLINE VIDEO STREAMING

Viewers today have far more control over when and how they watch television sitcoms, dramas, live sports, and movies than they did a generation ago.¹² User adoption of digital video recorders like TiVO and DVR cable service is not the only reason. Networked devices manufactured by Simple.tv and Roku, internet-based video-on-demand applications like those offered by Hulu and Amazon, and "over-the-top" online video services like those being developed by Sony and Verizon enable users to watch live or record-and-playback television programming whenever and however they want.¹³ According to one recent report, subscribers with high-speed internet connections now outnumber those with cable television.¹⁴

Until last summer, online streaming video distribution applications like Aereo and FilmOn were at the vanguard of such services. Aereo trans-coded over-the-air broadcast signals into a digital form for subscribers who,

11. The Copyright Office, for example, does not think the compulsory licensing law under the Copyright Act, the sister provision of the public performance right, covers internet transmissions. U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT (2008), available at <http://www.copyright.gov/reports/section109-final-report.pdf>.

12. See Alex Williams, *For Millennials, the End of the TV Viewing Party*, N.Y. TIMES (Nov. 7, 2014), http://www.nytimes.com/2014/11/09/fashion/for-millennials-the-end-of-the-tv-viewing-party.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=0.

13. *Id.*

14. Shalini Ramachandran, *More Cable Companies Take TV Off Menu*, WALL ST. J. (Oct. 3, 2014), <http://online.wsj.com/articles/more-cable-companies-take-tv-off-menu-1412120310>.

in turn, wanted to watch on their laptops or other mobile devices. For many observers, however, Aereo's online streaming service was nothing more than a tool used by its developers to exploit broadcasters' proprietary content without paying for it.¹⁵ Accordingly, broadcast networks and their affiliated local stations filed lawsuits across the country alleging that Aereo and FilmOn infringed their exclusive right under the Copyright Act to perform broadcast programs publicly.¹⁶ In many regards, the broadcasters' strategy proved very successful: Aereo has shuttered its business and filed for bankruptcy at the end of 2014.¹⁷

The problem is that the pertinent provision, the Transmit Clause of the 1976 Copyright Act,¹⁸ is not particularly clear about how courts ought to consider user-controlled video applications like Aereo. The statute's definition of what constitutes a public performance is inapposite to the workings and predominant consumer uses of online video.¹⁹ Congress, after all, drafted it in an era when broadcasters controlled the time and manner by which the public watched broadcast fare.²⁰ Aereo ostensibly did something new; their subscribers could watch broadcast network sports or TV dramas in whatever idiosyncratic way they chose: they could watch live or watch at a later time from any point in the program.²¹ And they could do all of this on virtually any device that has an internet connection.²²

The Transmit Clause is ambiguous enough on the question that judges across the country were divided on how to handle the various cases that

15. Cf. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (broadcasters brought suit against cable operators for violating public performance right under 1909 Copyright Act); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (same); *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. 2000) (broadcasters brought suit against first generation of online streaming video sites).

16. See, e.g., *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Fox Television Stations v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013); *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 386–87 (S.D.N.Y. 2012).

17. See *infra* note 120.

18. See 17 U.S.C. § 106(4) (2012) (public performance right); 17 U.S.C. § 101(2) (2012) (providing that to perform publicly under § 106 of the Copyright Act is “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times”).

19. See *supra* note 18.

20. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810 (2012)).

21. See Jerry Markon, Robert Barnes, & Cecilia Kang, *Supreme Court Rules Against Start-Up Aereo, Saying It Is Violating Copyright Laws*, WASH. POST (June 25, 2014) http://www.washingtonpost.com/national/supreme-court-rules-against-startup-aereo-saying-it-is-violating-copyright-laws/2014/06/25/59756f88-fc6b-11e3-8176-f2c941cf35f1_story.html (explaining that Aereo rebroadcasts live television at a cheap monthly rate, where the subscribers can access these programs more conveniently).

22. *Id.*

broadcasters brought.²³ The United States Court of Appeals for the Second Circuit and a district court in Massachusetts decided that the provision does not include the new applications, while district courts in the District of Columbia and California decided that they do.²⁴

The United States Supreme Court agreed to hear the case on appeal from the Second Circuit in January of this year and, in a 6–3 decision, sided with broadcasters. In his opinion for the majority, Justice Breyer likened Aereo to cable service, the video distribution technology that Congress explicitly brought under coverage of the 1976 Copyright Act.²⁵ The “behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens” was unknown to policymakers in 1976, but the general act of retransmitting broadcast signals to subscribers without authorization was.²⁶

Justice Scalia, writing for the three dissenters, rejected the analogy to cable, choosing instead to liken Aereo’s service to a “copy shop” that allows customers to use a copier on its premises.²⁷ Such stores would not be infringing any more than Aereo is.²⁸

As interesting as the substantive question about the scope of protection under current law is or ought to be, both the majority opinion and dissent overlooked the important role that federal agencies play in the legislative field. The Copyright Office and the FCC have for decades been applying the Copyright Act and the Communications Act, respectively, to disruptive video distribution technologies. For better or worse, Congress long ago decided that these agencies are best situated to understand new video applications as they emerge, monitor their impact on the market, and recalibrate the scope of legal protections in furtherance of legislative purposes.²⁹ They are charged with making legal sense of new technologies in the first instance.³⁰

The Justices and all of the federal judges who have heard the question, however, showed no respect for this arrangement. Indeed, neither the *Aereo* majority opinion nor the dissent even acknowledged it. They instead chose to interpret the scope of the public performance right without any real con-

23. See, e.g., *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

24. Compare *id.*, with *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013).

25. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) (“This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, ‘perform[s]’ (or ‘transmit[s]’). Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.”).

26. *Id.* at 2508.

27. *Id.* at 2513 (Scalia, J., dissenting).

28. *Id.* at 2513–14.

29. See *infra* Part II.

30. See *infra* Part III.

sideration of the agencies' findings or reports on the question.³¹ I posit here that they did so based on the myopic assumption that they alone have the duty of finding the proper balance between owners and creators in the first instance—or at least that they are as well situated as anyone else to make legal sense of disruptive new technologies.³²

A. *The Aereo Service*

Aereo streamed over-the-air broadcast programming to its paying subscribers.³³ The company relied on three important design features to provide the service. First, it assigned an individual antenna to a subscriber once it received a request from that subscriber to watch or record a program.³⁴ Subscribers would make their request by clicking a computer mouse or tapping their mobile device's display.³⁵ No two users would share the same antenna at the same time, even if they requested to watch or record the very same program at the same time.³⁶ Second, Aereo trans-coded the broadcast signal of the requested program and created an individual digital copy of that program in the requesting subscriber's personal directory.³⁷ Again, even when two users are watching or recording the same program at the same time, the stream that they receive through Aereo flows from the copy of the program in their own Aereo directory.³⁸ Finally, a subscriber could watch the copy of the desired program on his TV, computer, or mobile-device screen; no other Aereo user could ever view that particular copy.³⁹ In short, Aereo afforded users control over when and through which device they watched programs.⁴⁰ And it did so without authorization from broadcasters.

Aereo designed their service in this way in order to abide by the terms of the Second Circuit's decision in a 2008 case involving a cable television remote storage digital video recorder service ("RS-DVR").⁴¹ Cablevision, the principle defendant in that case, provided subscribers with RS-DVR

31. *Aereo*, 134 S. Ct. at 2504–11.

32. *See infra* Part I.D.

33. *Aereo*, 134 S. Ct. at 2503.

34. *Id.*

35. *See id.*

36. *Id.*

37. *Id.*

38. *See id.*

39. *Id.*

40. *See Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012) (citing expert reports); *see also* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 FCC Rcd. 4401, 4408 (2009).

41. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (referred to colloquially as "*Cablevision*").

service to copy and transmit broadcast and nonbroadcast programming.⁴² The *Cablevision* panel concluded that this service did not constitute a public performance within the meaning of the Copyright Act because, first, individual subscribers make their own copy of a broadcast network program through a click of their remote control and, second, the RS-DVR service automatically transmits that individual copy to the unique subscriber whenever the latter requests it.⁴³ Cable operators have virtually no active role in an automated individual transmission.

As novel as its service seemed, Aereo's entry into the market was not terribly surprising. First, applications for online streaming of broadcast and nonbroadcast television content had been available for years already.⁴⁴ Second, cable companies and broadcasters already were engaged in a very fraught battle over licensing and retransmission terms in ways that disadvantaged consumers. Specifically, broadcasters and other programmers blacked out their signals to gain leverage in their negotiations over retransmission.⁴⁵ Aereo simply sought to capitalize on the dispute, advertising itself as the modern-day alternative to the old and greedy incumbents.⁴⁶

Legislators in Congress, meanwhile, had been (and continue to be) considering bills that would address online video distribution. One bill would forbid cable and satellite operators, broadband providers, and other major media companies from engaging in anticompetitive practices against online video distributors, effectively giving the latter the same protections afforded to satellite providers.⁴⁷ It would also open the possibility for online video distributors to negotiate with broadcasters on streaming terms. The basic objective of this proposal is to afford users a mix of choices for video programming. The House Committee on Energy and Commerce, meanwhile, released a white paper that detailed current inadequacies in the

42. *Id.* at 124.

43. In a useful analogy, the *Cablevision* court likened RS-DVR service to a store that charges customers to use a photocopier on-site. *Id.* at 132. As with such a store, *Cablevision* could not be held liable for violating plaintiffs' rights under the Copyright Act because RS-DVR service automates subscriber requests, effectively removing any volitional conduct on the part of *Cablevision*. *Id.*

44. See, e.g., *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. 2000).

45. See Christopher Zara, *Fox News Blackout Takes a Bite Out of Dish Network's Pay-TV Subscribers*, INT'L BUS. TIMES (Feb. 24, 2015), <http://www.ibtimes.com/fox-news-blackout-takes-bite-out-dish-networks-pay-tv-subscribers-1827108>.

46. Aereo took out a full-page *New York Times* advertisement to emphasize the point. Greg Sandoval, *News War: Aereo Takes out Full-Page New York Times Ad as Network Threats Heat up*, THE VERGE (Apr. 18, 2013), <http://www.theverge.com/2013/4/18/4238774/aereo-takes-out-full-page-new-york-times-ad-against-network-threats>.

47. Consumer Choice in Online Video Act, S. 1680, 113th Cong. (2013); cf. Bryce Baschuk, *Rockefeller Unveils Aereo Friendly Online Video Legislation for Expanded Choice*, BLOOMBERG BNA (Nov. 12, 2013), <http://www.bna.com/rockefeller-unveils-aereo-n17179880063/>.

amended Communications Act, focusing in particular on the way in which the 1934 Act treats different communications platforms (i.e., broadcasting, cable, and wireless) differently.⁴⁸

B. *The Lawsuit*

Broadcasters, however, were not going to wait for legislative action. The major networks and their affiliated local stations in the largest television markets sued Aereo and FilmOn, another prominent online video streaming service, within a year after those services first became available. In cases filed in federal district courts in New York, Boston, Los Angeles, Washington, D.C., and elsewhere broadcasters alleged that Aereo and FilmOn directly infringed on broadcasters' right to perform their programs publicly every time the upstarts streamed broadcast content without permission.⁴⁹

The pertinent statutory provision of the Copyright Act, the Transmit Clause, defines the right to perform work "publicly" as,

[the right] to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁵⁰

According to plaintiffs, Aereo's method of distributing broadcast programming to subscribers violates the plain terms of the statute. It makes no difference, they alleged, if Aereo uses one big antenna (like a cable company, for example) or many small antennas to receive broadcast signals if, in either case, the company is retransmitting the same program to members of the public.⁵¹

48. H. COMM. ON ENERGY AND COMMERCE, MODERNIZING THE COMMUNICATIONS ACT (2014), *available at* <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf> ("The primary body of law regulating these industries was passed in 1934 and while updated periodically, it has not been modernized in 17 years.").

49. WNET Complaint for Injunctive Relief and Damages at ¶¶ 43–48, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. Mar. 1, 2012) (No. 12 Civ. 1543) (citing 17 U.S.C. §§ 106(4), 502 (2012)). American Broadcasting Companies, Inc. ("ABC") and WNET were co-plaintiffs in a suit against Aereo, Inc. *Aereo*, 874 F. Supp. 2d at 375–76. WNET also alleged infringement of their reproduction right under the Act as well as unfair competition, *WNET Compl., supra*, at ¶¶ 49–63, but the public performance claim drew the most attention. *See also* *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 683 (2d Cir. 2013).

50. 17 U.S.C. § 101(2). For the purposes of the act, "publicly" refers to "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Id.* § 101(1).

51. *WNET Compl., supra* note 49, at ¶ 3.

The district courts to hear the cases were of two minds: some were inclined to reject plaintiffs' suit, while others were alarmed by the new online video applications at issue. The United States District Court for the Southern District of New York denied broadcasters' motion for a preliminary injunction, relying on the Second Circuit's opinion from 2008 in *Cablevision*.⁵² It found that the similarities between the RS-DVR service in that earlier case and Aereo's streaming service were significant. The latter's subscribers, it explained, can stop, store, and playback programs in the same way that cable subscribers can control video through DVR service.⁵³ A few months later, the United States District Court for the District of Boston reached the same conclusion.⁵⁴

Broadcasters found success in cases in D.C. and California. A judge in the United States District Court for the Central District of California, for example, found that FilmOn infringed broadcasters' public performance right.⁵⁵ Explicitly rejecting the Second Circuit's reading of the Transmit Clause in *Cablevision*, the L.A.-based court explained that the underlying work and its transmission are not separate "performances" under Section 101; the statute is addressed to "the performance of the copyrighted work, irrespective of which copy of the work the transmission is made from."⁵⁶ The United States District Court for the District of Columbia found the California court's reasoning persuasive, but nevertheless provided its own rationale for its decision.⁵⁷ That court also imposed a nationwide injunction on online video streaming services like those provided by FilmOn and Aereo, excepting, of course, the states in the Second Circuit.⁵⁸ The California district court for its part had limited its injunction to the Ninth Circuit.⁵⁹

52. *Am. Broad. Cos.*, 874 F. Supp. 2d at 386–87. Plaintiffs chose not to pursue their reproduction right at the preliminary injunction stage. *See id.* at 376 (discussing the limited scope of the opinion).

53. *Id.* at 386.

54. *See Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 38 (D. Mass. 2013).

55. *See Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1143–44 (C.D. Cal. 2012) (discussing *Cablevision*). It decided the case before the Second Circuit published its opinion in April 2013.

56. *Id.* at 1144. FilmOn appealed the district court decision to the Ninth Circuit. In light of Ninth Circuit precedent with which the Second Circuit explicitly disagreed in *Cablevision*, *see Cablevision*, 536 F.3d 121, 138–39 (2d. Cir. 2008) (distinguishing *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991)), it was probable that the two most prominent federal appellate courts on intellectual property matters would have been split on the scope of the public performance right. Such a split never came to pass, however, as the Ninth Circuit stayed the case before it pending the Supreme Court's resolution of the appeal from the Second Circuit.

57. *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 33, 37, 44–52 (D.D.C. 2013).

58. *Id.* at 52.

59. *See BarryDriller*, 915 F. Supp. 2d at 1148.

Aereo, meanwhile, filed defensive lawsuits across the country, seeking to stave off the broadcasters' expensive no-holds-bar litigation strategy.⁶⁰

Broadcasters appealed the adverse decisions. Even while most federal courts across the country had not endorsed the Second Circuit's *Cablevision* approach, broadcasters could not tolerate an adverse decision in the jurisdiction with the largest television market.⁶¹ They also fine-tuned their argument, focusing in particular on the live streaming aspect of Aereo's service (as opposed to the record-and-playback function).⁶²

A divided Second Circuit panel affirmed the district court's decision.⁶³ The user control features of Aereo's online streaming service, it held, are sufficiently similar to make *Cablevision* dispositive as a matter of stare decisis.⁶⁴ The panel explained that, under *Cablevision*, the "to the public" language in the Transmit Clause refers to the potential audience for the *original transmission* and not to the underlying program.⁶⁵ The provision, it explained, cannot be read to include any and all transmissions of the same underlying program because such a reading could transform even private transmissions into public ones—say, when a viewer watches the program on another device in her house through her home network.⁶⁶ To allow such a reading, the panel explained, would effectively render the "to the public language" superfluous.⁶⁷ The only performance addressed in the provision, it explained, is created by the original act of transmission from broadcaster to the airwaves, not to the subsequent transmissions triggered by the user's request to play a recorded copy of the original transmission.⁶⁸ The court reasoned that, as in *Cablevision*, Aereo enables unique users to receive and watch their own transmission of the desired broadcast.⁶⁹

The *Aereo* panel also briefly examined the text and history of the Transmit Clause. Echoing *Cablevision*, it explained that Congress explicitly addressed the provision to "the emergence of cable television systems" in

60. See, e.g., Complaint for Declaratory Judgment, *Aereo, Inc. v. CBS Broadcasting*, No. 13-CV-3013 (S.D.N.Y. May 6, 2013).

61. See Brian Stelter, *Aereo Wins Court Battle, Dismaying Broadcasters*, N.Y. TIMES (Apr. 1, 2013), http://www.nytimes.com/2013/04/02/business/media/aereo-wins-in-appeals-court-setting-stage-for-trial-on-streaming-broadcast-tv.html?_r=0 ("The broadcasters, surprised and disappointed, said they were confident they would prevail eventually.").

62. See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) ("This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, 'perform[s]' (or 'transmit[s].')").

63. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 686–87, 696 (2d Cir. 2013).

64. *Id.* at 695.

65. *Id.* at 687 (citing *Cablevision*, 536 F.3d 121, 135–36 (2d Cir. 2008)).

66. *Id.* at 688.

67. *Id.* at 687–88 (citing *Cablevision*, 536 F.3d at 135–36).

68. *Id.* at 688–89 (citing *Cablevision*, 536 F.3d at 138).

69. *Id.* at 689–90.

the late 1960s and early to mid-1970s.⁷⁰ Congress made their intentions all the clearer, moreover, when, at the same time, it created a whole new compulsory licensing regime that would enable “cable systems” to retransmit broadcast programming.⁷¹ Together, the panel explained, the Transmit Clause and Section 111 were to moderate the high-stakes contest between broadcasters and cable operators.⁷² Congress, the panel continued, did no such thing for any other video distribution technologies at that time; it did not express any sense for how to structure a broad and all-inclusive statutory licensing regime that could accommodate “unanticipated technological developments” like online video streaming.⁷³ The design of the Aereo service could not have been anticipated.⁷⁴ And this was not a small point for the panel: the difference between “public and private transmissions” in the 1970s “was simpler than today.”⁷⁵

Judge Denny Chin wrote a forceful dissenting opinion.⁷⁶ He agreed that Congress incorporated the public performance right and corollary compulsory licensing regime in the 1976 Copyright Act in order to address cable retransmission of broadcast signals.⁷⁷ But, he continued, the majority’s decision privileges form over substance as it would allow unauthorized retransmissions through “a Rube Goldberg-like contrivance, over-engineered . . . to avoid the reach of the Copyright Act.”⁷⁸ For him, *Cablevision* is inapplicable because the RS-DVR service in that case supplements the real-time service for which cable systems pay statutory licensing fees under Section 111 and retransmission consent fees under the Communications Act.⁷⁹

In any event, Judge Chin continued, Congress explicitly sought to incorporate “all conceivable forms and combinations of wires and wireless

70. *Id.* at 685 (citing H.R. REP. NO. 94-1476, at 63 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5676).

71. *Id.* (citing 17 U.S.C. § 111(d) (2012)).

72. *Id.*

73. *Id.* at 694–95.

74. *Id.* at 694.

75. *Id.* at 694–95.

76. *Id.* at 696 (Chin, J., dissenting).

77. *Id.* at 704; cf. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (holding that cable service that retransmitted broadcast signal outside local area was not a public performance within the meaning of the 1909 Copyright Act); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (holding that cable operator’s retransmission of broadcast signal is not a public performance within the meaning of the 1909 Copyright Act).

78. *Aereo*, 712 F.3d at 697 (Chin, J., dissenting). It is worth mentioning here that, in *Cablevision*, the Second Circuit reversed then-District Court Judge Chin’s decision for broadcasters. *Cablevision*, 536 F.3d 121, 140 (2d Cir. 2008).

79. *Aereo*, 712 F.3d at 697 (Chin, J., dissenting); see also 47 U.S.C. §325(b)(6) (2012).

communications media” in their definition of “transmit.”⁸⁰ Congress, he argued, had a broad conception of public performance that, according to the legislative history, included any transmissions to the public, no matter whether individuals can watch and record at different times or in different places.⁸¹ While it did not foresee video streaming over the Internet, he conceded, Congress surely meant to include streaming in their definition of public performance under Section 101.⁸²

The *Aereo* majority’s short response to the dissent was that, after *Cablevision*, “technical architecture matters.”⁸³ The majority noted the plaintiffs’ argument that Aereo in all likelihood designed its system with that earlier case in mind—that is, its engineers quite plainly designed around the concerns that the Second Circuit identified in *Cablevision*.⁸⁴ But that, the majority continued, was not itself incriminating; this is not the first time that a company has developed a business plan or designed an information sharing technology with an eye to existing law.⁸⁵ Aereo provided just one of many emergent cloud computer services that *Cablevision* had arguably instigated.⁸⁶ Like those other services, the panel suggested, the company merely enables subscribers to control how they watch broadcast programs.⁸⁷

C. The Supreme Court

The plaintiffs in the Second Circuit case filed a petition for a writ of certiorari that the Supreme Court promptly granted early in 2014.⁸⁸ The Court heard argument in the case in April and, a couple months later, reversed the Second Circuit in a 6–3 decision.⁸⁹

The majority, in an opinion by Justice Breyer, was not as taken by the uniqueness of Aereo’s design as the Second Circuit panel majority had been.⁹⁰ Aereo’s one user, one antenna design, it explained, does not make the transmission less “public” for the purposes of the Transmit Clause.⁹¹

80. *Aereo*, 712 F.3d at 701 (Chin, J., dissenting) (quoting H.R. REP. NO. 94-1476, at 64 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5678).

81. *Id.* at 698–99.

82. *Id.* at 698.

83. *Id.* at 694 (majority opinion).

84. *Id.* at 693–94.

85. *Id.* at 694.

86. *Id.*

87. *Id.* at 692.

88. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). Interestingly, Aereo did not object to the petition. Petition for Writ of Certiorari, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (Oct. 11, 2013). Plaintiffs had filed a motion for rehearing with the full Second Circuit that the court promptly rejected. *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013).

89. *Aereo*, 134 S. Ct. at 2511.

90. *Id.* at 2507–08.

91. *Id.* at 2501.

The peculiar “behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens” does “not render Aereo’s commercial objective any different from that of cable companies.”⁹² The company’s service, it explained, does not “significantly alter the viewing experience of Aereo’s subscribers.”⁹³ The Transmit Clause’s language was not addressed solely to the original performance of the underlying work, the majority continued, but to every manner in which that underlying work is conveyed to members of the public.⁹⁴ Congress made this clear, the majority explained, by asserting in the statute that a public performance occurs “whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.”⁹⁵ In this regard, the Court noted, Congress specifically sought to overturn two prior Supreme Court opinions in which the Court refused to hold cable operators liable for violating the public performance rights of broadcasters under the old statute.⁹⁶ In the 1976 statute, the majority continued, Congress sought to impose liability on operators as well as subscribers for performing work—that cable operators were not merely making equipment available to viewers, but also impermissibly transmitting signals to viewers.⁹⁷

Accordingly, the Court explained, since Aereo “performs” broadcast programs “publicly” in the same way that cable operators do, it is bound by the same provisions of the Copyright Act—that is, neither Aereo nor any other online video distributors like it may retransmit broadcast signals without broadcasters’ authorization.⁹⁸

The majority limited the scope of its holding in the face of concerns from amici and others that a decision against Aereo might also impose unintended restrictions on cloud computing services generally.⁹⁹ The distinction between the online video distribution at issue and other internet-based services was not hard to make: unlike the latter, the majority explained, Aereo’s subscribers do not have any proprietary interest in the underlying works that Aereo makes available.¹⁰⁰ The Transmit Clause “does not extend to those who act as owners or possessors of the relevant product”; it could only be addressed to “cable companies and their equivalents.”¹⁰¹

92. *Id.* at 2508.

93. *Id.*

94. *Id.* at 2509.

95. *Id.* (quoting 17 U.S.C. § 101 (2012)) (internal quotation marks omitted).

96. *Id.* at 2505–06.

97. *Id.* (citing H.R. REP. NO. 94-1476, at 63 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5676).

98. *Id.* at 2511.

99. *Id.* at 2518 (Scalia, J., dissenting).

100. *Id.* at 2510 (majority opinion).

101. *Id.*

This means that, at a minimum, the provision covers entities that “communicate[] . . . contemporaneously perceptible images and sounds” of a work in the same way that cable providers do.¹⁰² In any event, the majority observed, the fair use doctrine provides a fail-safe mechanism against “inappropriate or inequitable applications of the Clause.”¹⁰³

Justice Scalia authored a dissenting opinion that Justices Thomas and Alito joined. In it, he rejected the majority’s conclusion that Aereo could directly infringe on broadcasters’ performance rights if subscribers, not Aereo, trigger the transmission of the underlying work.¹⁰⁴ The right question, he argued, was instead about the scope of secondary liability, not direct liability.¹⁰⁵ This is an important distinction, Justice Scalia explained, because Aereo does not engage in volitional conduct.¹⁰⁶ Its “automated, user-controlled system,” he continued, places the decisive volitional conduct in the hands of the subscriber.¹⁰⁷ Aereo, for its part, Justice Scalia concluded, does not have the requisite amount of intentionality to be directly liable for direct infringement.¹⁰⁸ He reasoned that it “does not ‘perform’ for the sole and simple reason that it does not make the choice of content.”¹⁰⁹ This is far different, he noted, than the cable services that gave rise to the Transmit Clause in 1976.¹¹⁰ Those services, Justice Scalia explained, actively defined the video content they supplied to subscribers.¹¹¹

In the end, Justice Scalia reserved his most caustic criticism for the majority’s “guilt by resemblance” approach to copyright law.¹¹² Among other things, he observed, the House Report to which the majority only cited once could not be reflective of congressional intent at the time.¹¹³ In any event, he explained, the majority’s decision to turn “performance” on a “cable-TV-lookalike rule” does not provide much clarity for other online video distribution services.¹¹⁴

102. *Id.* at 2509.

103. *Id.* at 2511.

104. *Id.* at 2512–13 (Scalia, J., dissenting).

105. *Id.* at 2514.

106. *Id.* at 2512–13.

107. *Id.* at 2513.

108. *Id.* at 2514.

109. *Id.*

110. *Id.* at 2515.

111. *Id.* at 2515–16.

112. *Id.* at 2515–17.

113. *Id.*

114. *Id.* at 2516. Justice Scalia posited that the “cable-TV-lookalike rule” as such would not resolve whether a record-and-playback service like that offered by Aereo (but not on review on appeal) infringes on broadcasters’ public performance right. *Id.* at 2516–17. Under current law, however, that sort of “time shifting” would likely be a permissible fair use. The majority seemed

D. Agency Work (or, What the Aereo Opinions Did Not Mention)

The authors of the majority and dissenting opinions reached their conclusions in the absence of any clear precedent on the question of how broadly the public performance right reaches. Justice Breyer thought it was important to identify and make sense of the Transmit Clause's general legislative purpose in the context of the new technology.¹¹⁵ He wondered whether Aereo's service was much different from cable, and concluded that it was not.¹¹⁶ It did not matter that online video streaming was unknown to lawmakers in 1976. He just presumed that, under the Copyright Act, users must have an underlying relationship with the work in question in order to avoid liability under the Transmit Clause, although no court has ever required as much.

Justice Scalia's dissent, on the other hand, was characteristically dismissive of the use of legislative history as a methodology for interpreting the meaning of the Transmit Clause.¹¹⁷ He determined that the semantic meaning of the operative verb in the Transmit Clause—"perform"—required a volitional act on the part of the alleged infringer even though, not unlike the majority opinion, the Supreme Court has never adverted as much.¹¹⁸

In this regard, the Breyer and Scalia opinions in *Aereo* were just the latest installments in the longstanding feud between the two about judicial interpretive approach. They were both unwaveringly confident in their authority to make legal sense of the new technology without consultation of anything more than the statute and their own interpretive methodology.¹¹⁹

This preoccupation was put in full relief in the *Aereo* case because federal agencies—that is, important institutional interpreters of public law other than courts—have over the past decade or so sought to clarify how to treat online video distributors under the Copyright Act or the Communications Act. The Copyright Office, as I explain in more detail in Part III below, has for over the past decade repeatedly observed that online video dis-

to agree as much with this point. *Accord id.* at 2511 (majority opinion) (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984)).

115. *Id.* at 2502–10.

116. *Id.* at 2507. Courts have often felt compelled to make analogies to conventional communications technologies in order to make legal sense of the internet. This has the unfortunate effect of underappreciating the novel particularities of the specific online service or application at issue.

117. *Id.* at 2515 (Scalia, J., dissenting)(referring to “the severe shortcomings” of reliance on legislative history as an “interpretive methodology”).

118. *But see Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.”).

119. *See supra* Part I.C.

tributors are not “cable systems” within the meaning of Section 111 of the Copyright Act, the sister provision of the Transmit Clause. Those agency decisions clearly are at odds or at least inconsistent with the majority’s decision in *Aereo*. The FCC for its part has been administering a proceeding on whether online video distributors owe the same duties to broadcasters that cable operators and other multichannel video programming distributors (“MVPDs”) do. As with their silence on the Copyright Office’s implementation of Section 111, the Justices’ omission of these proceedings borders on remarkable. The Justices’ silence on the role that these agencies have been playing since the advent of the online video distribution is all the more notable in light of the fact that both Justices Breyer and Scalia are former scholars and teachers of administrative law.

To put the matter more starkly: neither *Aereo* opinion gave any consideration to whether the courts are the right or best institutions for deciding how to treat online video streaming in the face of so much agency work on the matter. The Justices took for granted that they are. And, as it goes, they were not alone. None of the other trial or appellate courts to hear the cases against *Aereo* or FilmOn before the Supreme Court’s decision last summer gave any meaningful consideration (never mind deference) to agency actions on the matter.¹²⁰

My argument here is that courts should, as a matter of course, attend to the agencies that Congress set in motion in the Copyright Act and the Communications Act. Courts and information law scholars have attended to the relative institutional roles that legislatures, agencies, and courts play

120. See *supra* Part I.B. After the Supreme Court decision, *Aereo* sought to amend its pleadings to allege that it qualified for a compulsory license under Section 111. Joint Letter of Parties at 3 (July 9, 2014) (No. 12-cv-1540), available at <http://blog.aereo.com/2014/07/3784/>. In the litigation that led to the Supreme Court decision, *Aereo* had argued that it could not qualify as a cable system. The company thought it could invoke the provision as an affirmative defense to broadcasters’ motion for an injunction, particularly after the Supreme Court held that *Aereo* is like a cable system for the purposes of the Transmit Clause. It argued that, if they are a cable system under the Copyright Act, they are entitled to the benefits of the statutory license under 111(c). It accordingly filed statements of account and royalty fees with the Copyright Office. The agency promptly rejected the request. “[I]nternet retransmissions of broadcast television,” it explained, “fall outside the scope of the Section 111 license.” Letter from General Counsel and Associate Register of Copyrights, Jacqueline C. Charlesworth, United States Copyright Office, to Matthew Calabro, *Aereo, Inc.* (July 16, 2014), available at http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf. The company filed for bankruptcy soon afterward. Tanya Agrawal & Jonathan Stempel, *Video streaming service Aereo files for bankruptcy*, REUTERS (Nov. 21, 2014), <http://www.reuters.com/article/2014/11/21/us-aereo-bankruptcy-idUSKCN0J513K20141121>. In spite of this filing, broadcasters continue to prosecute their substantive infringement claim. See Broadcasters’ Motion for Relief from Stay Pursuant to 11 U.S.C. § 362(d) and Memorandum of Law, *In re Aereo, Inc.*, Case No. 14-13200 (S.D.N.Y. 2014), available at <http://ia601409.us.archive.org/12/items/gov.uscourts.nysb.254268/gov.uscourts.nysb.254268.47.0.pdf>.

in resolving disputes arising from disruptive networked communications technologies in a variety of other substantive legislative fields.¹²¹ No one, however, has done so for the public performance right. To the extent legal commentators have written about the online video streaming cases, they focus on what the right substantive policy ought to be; they ask whether courts have struck the proper balance between content owners, innovators, and the public.¹²²

That this has been the narrow focus of scholarship is no surprise. The preoccupation with finding the best positive substantive outcome (irrespective of legal process and governance) is the staple of information law scholarship. The most enduring (and celebrated) law review article in the area argued that policymakers ought to promulgate more than statutory prohibitions because today's software writers and computer engineers are demonstrably too wily to be daunted by them.¹²³ Legislators and policymakers, this scholar argued, ought to implement "soft" forms of regulation that foster innovation.¹²⁴

But, today, over three decades since its commercialization, the Internet is far more than an innovation machine that policymakers must regulate delicately.¹²⁵ Today, as is quite evident in the growth of the market for online video, the Internet is now fully integrated into public life. At least for now, the transmission protocol on which the Internet is based is the dominant means of distributing information.¹²⁶ Parties are now more than ever asking courts to resolve high-stakes communication technology disputes in a varie-

121. See, e.g., Frischmann & Lemley, *supra* note 9; Fetzer & Yoo, *supra* note 9; Freiwald, *supra* note 9; Kerr, *supra* note 9; Mazzone, *supra* note 9; Parchomovsky & Weiser, *supra* note 9; Solove, *supra* note 9.

122. See, e.g., Novak, *supra* note 8; Rasenberger & Pepe, *supra* note 8, at 641–43.

123. See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 513–14 (1999); see also Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554–55 (1998) ("[L]aw and government regulation are not the only source of rulemaking. Technological capabilities and system design choices impose rules on participants. The creation and implementation of information policy are embedded in network designs and standards as well as in system configurations.").

124. LAWRENCE LESSIG, CODE 2.0 175 (2006) ("Code can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace. Private fences, not public law."); see also LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 184 (1999); Joel R. Reidenberg, *supra* note 123, at 554–55.

125. Cf. Sylvain, *supra* note 10.

126. See, e.g., Order, Technology Transitions, 29 FCC Rcd. 1433 (2014) (ordering experimentation for the transition from traditional time-division multiplexed circuit-switched voice services to an Internet protocol based voice service).

ty of settings presumably because there is no obvious answer to what the proper policy balance ought to be.¹²⁷

The overwhelming focus on substantive policy outcomes ignores the far more pertinent question today of how courts ought to make legal sense of laws when technologies change and prevailing public law objectives are in tension. These are difficult questions to answer. They are all the trickier for judges when sophisticated and well-resourced public interest groups, trade associations, and transnational conglomerates bring to bear their own interests to the question.

Congress delegated first-instance policymaking authority to the Copyright Office and the FCC precisely for these reasons. Courts accordingly have deferred to those agencies (under *Chevron*, for example) for the same reasons.¹²⁸ This is why the *Aereo* opinions are so remarkable; the Justices evinced no awareness of this background.

The *Aereo* case accordingly provides an opportunity to consider the ways in which courts might develop a more careful approach to making legal sense of disruptive technologies when statutes are ambiguous. I outline in Part III what such an approach would look like. In short, I argue that courts ought to determine at the outset, before deciding the substantive question, whether the agencies that Congress has charged with filling in gaps in video distribution law have addressed or are in the process of addressing the matter.¹²⁹ Before setting out the contours of this proposal, however, I show in Part II below that the Copyright Office and the FCC have, indeed, been very active in the legislative field of video distribution for decades.

II. VIDEO DISTRIBUTION LAW IN FOCUS

Contemporary legal disputes involving novel communications technologies generally arise from disagreements between individual users, entrepreneurs, and engineers over the meaning or scope of existing public law. It is no surprise that new technologies could trigger such heated, high-stakes disagreement. The original language and purpose of laws concerning

127. See, e.g., *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Viacom Int'l v. Youtube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013).

128. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (applying *Chevron* deference to the FCC's rulemaking on cellphone tower siting provision in the Communications Act); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279-85 (2d Cir. 2012) (applying *Chevron* and *Skidmore* deference to Copyright Office's findings regarding §111 of the Copyright Act). See generally GOLDSTEIN ON COPYRIGHT, § 3.20, n.7 (3d Edition 2005) (observing that, while "[c]ircuits divide on the deference to be given to the Copyright Office[,] . . . some courts give so-called '*Chevron* deference'").

129. See *infra* Part III.C.

networked communications were not designed to address modern-day realities.

Courts employ different interpretive strategies to resolve such disputes depending on the nature of the particular statutory provision at issue and in consideration of the applicable institutional constraints. On the one hand, they might take it upon themselves to resolve a matter in the first instance without consulting anyone else. Or, on the other hand, they might consult or defer to other institutions (i.e., administrative agencies) on the assumption that the latter are better suited to resolving such disputes in the first instance than courts are.

But, in *Aereo*, the Supreme Court did not evince any awareness that they had a choice in the matter. Neither the majority nor the dissent gave a moment's consideration to whether it (or any federal courts) should defer to or even consider the work of the Copyright Office or the Federal Communications Commission on video distribution law.¹³⁰ They presumably believed that it was their responsibility to resolve the contest between broadcasters and the developers of online video distribution applications, in spite of the regulatory regimes that Congress created solely for that purpose. To give some context for this glaringly immodest view of their relative institutional role, here, in this Part, I outline the public law that they ignored.

A. *The History and Political Economy of Video Distribution*

Broadcast radio and television have played an important role in defining American public life for several decades now. But Congress enshrined the political economy of broadcast distribution in the Radio Act of 1927, and then the Communications Act of 1934.¹³¹ In both, broadcasters were to be the vital trustees of the public airwaves. A station could only obtain a license to use a frequency in the electromagnetic spectrum if it could demonstrate to the FCC (and the Federal Radio Commission before it) that it would act in the public interest.¹³²

This regulatory arrangement was the backdrop for the advertising-based broadcast network system of the twentieth century. The major broadcast networks entered into exclusive agreements with local station affiliates across the country to distribute original programming. The networks and their affiliates supported this system by selling time during the airing of their programs to advertisers. Audience size translated into revenue; the bigger and more captive the audience, the greater the revenue to broadcasters.

130. See *supra* Part I.C.

131. See Pub. L. No. 69-632, 44 Stat. 1162; Pub. L. No. 73-416, 48 Stat. 1064.

132. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

The popularity of programming was therefore essential to the flow of revenue. The major studios did everything they could to keep audiences coming back for more. Daytime programming was important, of course. But, in this scheme, the most lucrative airtime was (and, for broadcasters, still is) in the evening: primetime, after people had come home from work and eaten dinner.

American viewers generally abided by this schedule, organizing their waking lives around weekly listings in *TV Guide* and the local newspaper. Television was the great electronic hearth by which viewers, together, enthusiastically basked in a shared American culture. Anchormen like Walter Cronkite supplied reassurance during difficult times. Popular episodic comedies like *The Honeymooners* and *I Love Lucy* made fun and sense of the times. The American public experienced primetime television in one sitting as a single community. Of course, there were minorities, outliers, and dissenters who did not follow mainstream television programming.¹³³ For the most part, however, broadcast television was an important galvanizing force in American life.¹³⁴

The Internet and online video in particular have dramatically redefined the way in which viewers interact and watch video programming.¹³⁵ Of course, broadcast television programming continues to play an important part in American popular culture today. Just ask the contestants on *Dancing with the Stars* or any one of the *Real Housewives*. But it does not occupy the defining position in the culture that it once did. The key difference is that viewers more than ever watch video content on their laptops and mobile phones at the time of their choosing.¹³⁶ At a minimum, the attraction of live or prime time television as such is not as salient to young adult viewers.¹³⁷

To be clear, online streaming of broadcast programming has existed for only a little more than a decade.¹³⁸ It still comprises a small fraction of

133. Olivier Sylvain, *Contingency and the "Networked Information Economy": A Critique of The Wealth of Networks*, 4 INT'L J. TECH., KNOWLEDGE & SOC'Y 203 (2008).

134. Cf. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1982).

135. See Tim Wu, *Netflix's War on Mass Culture*, NEW REPUBLIC (Dec. 4, 2013), <http://www.newrepublic.com/article/115687/netflixs-war-mass-culture>.

136. See generally Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 FCC Rcd. 4401, 4406–09 (2009) (discussing Slingbox and other technological innovations).

137. NIELSEN COMPANY & THE COUNCIL FOR RESEARCH EXCELLENCE, *OUT OF HOME TELEVISION AND OTHER VIDEO VIEWING BEHAVIORS OF U.S. ADULTS: RESULTS FROM THE COUNCIL FOR RESEARCH EXCELLENCE VIDEO CONSUMER MAPPING STUDY* (2010).

138. See *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. 2000) (finding for broadcasters in suit challenging web-based transmission of U.S. over-the-air programs to viewers in the United States via a Canadian website).

TV viewing today.¹³⁹ But so much more seems to be at stake today, as the number of online video viewers will continue to increase in the coming years.¹⁴⁰

The popularity of online video content has grown so much over just the past decade or so that it is now cutting into markets long dominated by broadcasters. Companies like Hulu, Amazon, and Netflix have for the past seven or so years supplied internet-enabled platforms for streaming episodic shows and feature films. In the past two years, they have developed their own critically acclaimed original episodic programs like *House of Cards* and *Orange is the New Black* and feature films like *Mitt*.¹⁴¹ And, of course, YouTube and Vimeo provide internet-based platforms for user-generated video content. Cable programmers like HBO, too, are now getting in the game, promising to deliver their premium content to online streamers who do not subscribe to cable.¹⁴²

Online streaming of broadcast programming poses one of the biggest threats to the traditional political economy of video production and distribution. It is no wonder that Nielsen, the audience measurement firm, now includes mobile devices in its analysis of TV audiences.¹⁴³ News, moreover, that Comcast, the cable television giant, entered a special “peering” arrangement with Netflix earlier this year to manage the latter’s high bandwidth traffic to users portends quite a fundamental restructuring of the video distribution market.¹⁴⁴

139. Alex Kantrowitz, *Are Advertisers Spending Too Much on Online Video?*, ADVERTISING AGE (Sept. 11, 2013), <http://adage.com/article/digital/nielsen-online-video-consumption-tiny-compared-tv/244084/>.

140. Associated Press, *Cord Cutting a Trend? Nielsen to Begin Counting Online Streaming*, CBS NEWS (Feb. 21, 2013), <http://www.cbsnews.com/news/cord-cutting-a-trend-nielsen-to-begin-counting-online-streaming/>.

141. *Cf. Agape Church, Inc. v. FCC*, 738 F.3d 397, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“[C]able regulations adopted in the era of *Cheers* and *The Cosby Show* are ill-suited to a marketplace populated by *Homeland* and *House of Cards*.”).

142. Issie Lapowsky, *Down with Cable! Why HBO Is Finally Launching a Standalone Streaming Service*, WIRED (Oct. 15, 2014), http://www.wired.com/2014/10/hbo-streaming-service/?mbid=social_twitter.

143. Todd Spangler, *Nielsen to Add Mobile Device Viewing to TV Ratings in Fall 2014*, VARIETY (Sept. 19, 2013), <http://variety.com/2013/tv/news/nielsen-to-add-mobile-device-viewing-to-tv-ratings-in-fall-2014-1200649185/>.

144. Steven Musil, *Netflix Reaches Streaming Traffic Agreement with Comcast*, CNET (Feb. 23, 2014), http://news.cnet.com/8301-1023_3-57619353-93/netflix-reaches-streaming-traffic-agreement-with-comcast/. This announcement came on the heels of other news that, pending regulatory approval, Comcast, the largest cable operator in the country, will acquire Time Warner Cable, the second largest cable operator in the country. Michael Santoli, *Comcast and Time Warner Cable Merger: What It Means for Consumers*, YAHOO! FINANCE (Feb. 13, 2014), <http://finance.yahoo.com/blogs/daily-ticker/comcast-to-acquire-time-warner-cable-143000745.html>.

Broadcasters today are eager to find, and jealously guard, viewers where they can. And they are invoking all of the legal protections available to them to ward off emergent networked communications companies.¹⁴⁵

What are courts to do now that the traditional model for distributing premium video is being inverted by a technology that enables individual users to control where, when, and on what device they watch content? The courts to which the question was posed in the cases involving Aereo and FilmOn were divided about the scope of the public performance right and its application to these new forms of video distribution—that is, until the Supreme Court decided the matter this past summer. Their uncertainty was no surprise. On the one hand, the language in the Transmit Clause recognizes that transmissions that are delivered to different places at different times could still be performed publicly within the meaning of the statute. But the law was also conceived at a time when video distribution was mostly comprised of simultaneous transmissions of live and episodic network programs. They were public in the colloquial sense; broadcast television articulated shared cultural and political priorities that were experienced contemporaneously by all viewers. Today, online video subscribers trigger the “performance” of broadcast programs with a click or tap of their networked device. In light of the great variety of video programming now available, it makes little sense to refer to the public in the same sense as broadcast law posits, at least because “performances” are experienced in a far more fractured and diffuse way than they were just a generation ago.

B. Agencies and the Public Law of Video Distribution Today

The Copyright Act and the Transmit Clause memorialized a hard-fought, decades-long legislative settlement concerning powerful interests in the market for video distribution. Congress enacted the public performance right under Section 106 and the corollary compulsory licensing regime in order to settle the conflict between broadcasters and cable operators. In the four decades since, Congress has incrementally reformed this regime to account for new video distribution technologies as they have emerged.¹⁴⁶

145. *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. 2000) (holding for broadcast content owners in dispute concerning the public performance of copyrighted programming framed with advertisements obtained by defendants from Toronto to computer users in the United States); *see also* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) (holding that an internet-based video streaming site is not a “cable system” within the meaning of 17 U.S.C. § 111, the compulsory licensing provisions of the Copyright Act). I use the term “emergent” or “novel” networked communications throughout to denote the category of technologies that, while extant and available to users, have not yet been the subject of legal analysis or interpretation by courts.

146. *See, e.g.*, Satellite Home Viewer Improvement Act of 1999 (Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999), 47 U.S.C. §§ 335–338 (2012).

But the Copyright Act does not comprehensively cover the field. Congress also has amended the Communications Act consistently since its enactment in 1934 to define the legal obligations and entitlements of the variety of extant stakeholders in the field of broadcast and video distribution. Congress, for example, substantially revised the law governing the retransmission of broadcast programming in 1992 in two ways. First, Congress required cable and direct broadcast satellite service (“DBS”) providers to carry certain broadcast programming. Second, Congress created for broadcasters a new statutory right to veto cable operators’ unauthorized retransmission of broadcast content.¹⁴⁷ These two provisions—must-carry and retransmission consent—were to work in tandem to improve broadcasters’ market position vis-à-vis cable operators. These changes to the Communications Act adopted the approach that the FCC had employed for decades before. Congress, moreover, was explicitly mindful that these reforms to the Communications Act would interact with the public performance right and the compulsory license regime in the Copyright Act.¹⁴⁸

In this vein, the 1992 Communications Act amendments fill out a legislative field of which the public performance right is just one very small piece. I show here that the combined history of the public performance right, the compulsory licensing regime, must-carry regulation, retransmission consent, as well as program access paints the picture of a legal field that is determined above all by legislation and regulation rather than judge-made law. At every critical juncture in the evolution of the market for video distribution, Congress, the Copyright Office, and the FCC have been the decisive policymaking bodies, filling in gaps and ambiguities of the governing statutes when novel technologies emerge and the general market circumstances change over time. This Part sets up my argument in Part III that courts are misguided when they take it upon themselves to elaborate any single feature of this regime with barely a whisper about this regulatory context.

1. The Copyright Act

a. Public Performance and the Statutory License

Before 1976, cable operators did not seek the permission of local stations to retransmit broadcast programming. Broadcasters were perfectly content with this arrangement. They did not really see cable service as a

147. Pub. L. No. 102-385, 106 Stat. 1460; see *iCraveTV*, 2000 WL 255989 (holding for broadcast content owners in dispute concerning the public performance of copyrighted programming framed with advertisements obtained by defendants from Toronto to computer users in the United States).

148. See, e.g., 47 U.S.C. § 338(a)(1) (explicitly referring to 17 U.S.C. § 122 (2012)).

threat. To the contrary, they believed that cable operators could, at best, marginally expand viewership.¹⁴⁹ They understood cable television to be more charity than market disruption.

At least in its early years, it arguably was. The cooperatives and early operators of what was then called “community antenna television” retransmitted broadcast signals to members and potential viewers who, for a variety of reasons, could not otherwise receive clear signals.¹⁵⁰ Their main objective was not to compete with broadcasters. They used large antennas as well as signaling and amplification technologies to receive over-the-air broadcast signals that they would otherwise not be able to get.¹⁵¹ Operatives retransmitted those signals by cable (or microwave) to interested neighbors’ televisions.¹⁵²

It was only as cable service became more popular in the 1960s that broadcasters grew concerned.¹⁵³ Under the advertising-based network-affiliate model of broadcast programming distribution, local stations paid for network content on the condition that they would be the exclusive purveyors of the content in that given local market.¹⁵⁴ Local stations could count on monetizing local advertisers’ interest in reaching local audiences. While they welcomed national advertising, each station cultivated an exclusive relationship with a major broadcast network in order to attract local advertisers.¹⁵⁵ Since local advertisers had no real interest in reaching distant markets, a station’s decision to enter into an exclusive agreement with a major network was a simple exercise in arithmetic.

Cable television unsettled this arrangement. A local cable operator reduced broadcasters’ ability to measure the size of their respective local audience for their programming.¹⁵⁶ This was a clear threat for a business model that depended as heavily as it did (and still does) on the ability to measure and collect data about audiences.

149. See ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, *CABLE TV: REGULATION OR COMPETITION* 2 (1996). During this period, moreover, the FCC chose not to regulate cable retransmission. See *Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV “Satellite” Stations, and TV “Repeaters” on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 431 (1959) (“[W]e find no present basis for asserting jurisdiction or authority over CATV’s . . .”).

150. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 391–92 (1968).

151. See generally Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 827 (2012).

152. *Id.*

153. See, e.g., *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964).

154. ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES 1933–1953* (1968).

155. *Id.*

156. MARY ALICE & MAYER PHILLIPS, *CATV: A HISTORY OF COMMUNITY ANTENNA TELEVISION* 42 (1972); MARTIN H. SEIDEN, *AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY* 44 (1965).

By the sixties, cable television matured into a line of business for which viewers were showing a willingness to pay a fee. By the 1970s, cable operators also began to develop their own programs. As such, cable was disrupting the whole political economy of broadcast distribution.¹⁵⁷

Broadcasters in particular grew concerned that cable operators were monetizing their original programming without permission or compensation. They accordingly brought suits against cable operators, alleging that they were, among other things, infringing on their exclusive right to “perform” dramatic works publicly for profit under the 1909 Copyright Act.¹⁵⁸

The Supreme Court rejected broadcasters’ claims in two opinions by Justice Potter Stewart. In *Fortnightly v. United Artists*¹⁵⁹ in 1968 and *Teleprompter v. Columbia Broadcasting System*¹⁶⁰ in 1974, the Court held that community access television did not infringe on broadcasters’ public performance rights under the 1909 Copyright Act.¹⁶¹ Retransmission by cable, the Court concluded in *Fortnightly*, was not a public performance within the meaning of the 1909 law because “the basic function” of the amplification technologies at issue is not unlike anything that the ordinary broadcast television viewer can do to receive a signal on her own.¹⁶² CATV cooperatives and commercial operators in this sense are “passive beneficiar[ies]” of broadcasters’ performances; they are not the purveyors of programming as such.¹⁶³

The Court in *Teleprompter* applied this holding to cable operators that imported distant (that is, not local) broadcast signals into local markets, interconnected with other area CATV systems, originated their own video content, and sold advertising.¹⁶⁴ Those operators, it explained, also do not perform within the meaning of the 1909 Copyright Act.¹⁶⁵ First, the Court reasoned, it made no difference under the 1909 Act that cable operators had become entrepreneurial if there was still no “nexus” between these new features and the broadcast content that they retransmitted.¹⁶⁶ Second, the Court rejected the argument that cable operators transformed into performers within the meaning of the 1909 law when they began importing distant signals into local areas that would otherwise not receive them. This importation function, the Court explained, does not change the nature of cable

157. See Sylvain, *supra* note 151 at 827–28.

158. See *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 395 (1968).

159. 392 U.S. 390 (1968).

160. 415 U.S. 394 (1974).

161. *Fortnightly*, 392 U.S. at 400–02; *Teleprompter*, 415 U.S. at 405.

162. *Fortnightly*, 392 U.S. at 399.

163. *Id.* at 398–99.

164. *Teleprompter*, 415 U.S. at 408.

165. *Id.* at 410–12.

166. *Id.* at 405.

service because, as in systems that retransmit local signals to local audiences, it remains a wholly “viewer function.”¹⁶⁷ Broadcasters, it explained, send their programs out to the public to be received and watched. Cable operators simply make that content available to viewers.¹⁶⁸ The Court was also not particularly taken by the argument that cable television upsets the political economy of the advertising-based system of broadcasting. Cable operators, Justice Stewart observed, only expand broadcasters’ potential viewer market, and only really affect their relationship with advertisers.¹⁶⁹

Having failed in the courts, broadcasters appealed to Congress.¹⁷⁰ There, they found a more hospitable forum. This is not to say that Congress obliged their every request; it did not. Rather, the legislative process, more than litigation, was far more conducive to resolving the variety of policy concerns—concerns involving competition, the distribution of free programming, and the protection of local broadcasters.

Legislators, moreover, were already inclined to reform the existing copyright law. Indeed, by the 1950s, legislators already were considering ways to update the 1909 Act.¹⁷¹ By the 1960s, many of the reforms that would appear in the 1976 statute had already been “hammered out.”¹⁷² Indeed, as early as 1966, members of the House were circulating a version of a provision that resembles the enacted provision we now call the Transmit Clause.¹⁷³ The report that accompanied the provision at this early stage observed, moreover, that the provision was addressed to transmissions that are “capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.”¹⁷⁴ The report made this observation to explain the last clauses of the Transmit Clause addressed to time and place.¹⁷⁵

167. *Id.* at 408.

168. *Id.* at 408–09.

169. *Id.* at 411–13.

170. EILEEN R. MEEHAN, WHY TV IS NOT OUR FAULT: TELEVISION PROGRAMMING, VIEWERS, AND WHO’S REALLY IN CONTROL 45 (2005) (“[V]arious pay-television schemes in the 1960s led the National Association of Broadcasters (NAB) and networks to lobby Congress, the FCC, and the public to protect ‘free television’ from cable’s potential threat.”).

171. See Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1, 31 (2011) (“Congress set out to update the 1909 Copyright Act at various points during the first half of the twentieth century without success.”).

172. *Id.* at 32.

173. Compare H.R. REP. NO. 89-2237, at 57–58 (1966) (defining “transmit” and “public” under proposed Copyright Act revisions), with 17 U.S.C. § 101(2) (2012) (defining “publicly” in the Transmit Clause).

174. H.R. REP. NO. 89-2237, at 58.

175. *Id.* The congressional report’s description appears to describe the Aereo design. See *supra* Part I.A. But, to be clear, it does not address individuated recording applications like Aereo’s

The steady emergence of cable television and the *Fortnightly* and *Tel-eprompter* litigation complicated this legislative work. In those cases, the Court gave cable operators more leverage than they had before the opinions were announced. This is what the 1976 Act sought to resolve. As I explained above, in the Transmit Clause, Congress explicitly overturned the holdings in these Supreme Court cases.¹⁷⁶

Importantly, Congress also set out a compulsory licensing scheme through which “cable systems” would have to pay a statutorily defined fee under Section 111.¹⁷⁷ That provision provides that:

secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.¹⁷⁸

Section 111 defines a cable system in pertinent part as “a facility” that “receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the [FCC], and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”¹⁷⁹ This legislative arrangement allowed cable operators to continue to retransmit without having to concern themselves with the “transaction costs associated with marketplace negotiations for the carriage of copyrighted programs.”¹⁸⁰ Under this scheme, however, cable operators would have to pay broadcasters in order to retransmit their programming to cable subscribers.¹⁸¹

or FilmOn’s. At most, the report raises questions about the Second Circuit’s analysis of the Transmit Clause in the *Cablevision* case, where the defendant cable operator stored broadcast content in its single “information system” and retransmitted those signals “at the initiative of individual members of the public.” *Cablevision*, 536 F.3d 121, 135 (2d Cir. 2008) (quoting H.R. REP. NO. 90-83 at 29 (1967)).

176. See *supra* text accompanying notes 94–98.

177. 17 U.S.C. § 101(2) (defining public performance: to wit, “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times”); *Id.* § 111 (creating compulsory licensing regime for retransmission of broadcast programming by a cable system).

178. *Id.* § 111(c)(1).

179. *Id.* § 111(f)(3).

180. U.S. COPYRIGHT OFFICE, *supra* note 11, at 3.

181. See 17 U.S.C. § 111(d). Some broadcasters today would like to see the compulsory licensing regime discontinued. See JOHN BERGMAYER, *THE CABLE AND SATELLITE COMPULSORY*

Congress settled on these terms with the specific political economy of cable retransmission of broadcasting programming in mind. There was nothing inevitable or objectively optimal about the balance that it struck. The impetus for legislative intervention was simply that cable service had become a viable player in the broadcast television market. Congress set out “[l]imitations on exclusive rights” to retransmit “broadcast programming by cable.”¹⁸²

One can go further and conclude, as the Second Circuit did in *Aereo*, that when Congress drafted the Transmit Clause, it did not intend to confer a sweeping protection to content creators for all time. Rather, legislators redressed the controversy known to them at the time, explicitly settling on “a series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems.”¹⁸³ There was “no simple answer to the cable-copyright controversy,” the House Report on the bill explained.¹⁸⁴ Congress was simply doing the best it could to find a balanced approach to the existing market for video programming. In this way, Congress moderated the specific extant interests. Had it sought to account for any possible iteration of video distribution, it could have said so.¹⁸⁵

b. The Copyright Office

But Congress did more than define the relative entitlements and duties of broadcasters and cable operators. Under Section 111, it also delegated to the Copyright Office the responsibility of administering the licensing regime and,¹⁸⁶ as I show here, refining the balance of interests as communications technologies change and new technologies emerge.

The statute prescribes the conditions under which cable providers may obtain a compulsory license to retransmit copyright works. The agency’s role is, on the one hand, quite mundane: it must elaborate the form and content of filings by providers for the purposes of administering compulsory licensing filings and facilitating payments.¹⁸⁷ This authority is not unlike the role the agency plays in the administration of licensing for the distribu-

COPYRIGHT LICENSES 1, 4 (2011),
<http://siliconflatirons.com/documents/publications/report/CompulsoryCopyrightLicenses.pdf>.

182. 17 U.S.C. § 111 (describing title of section).

183. H.R. REP. NO. 94-1476, at 89 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5678.

184. *Id.*

185. Compare *id.*, with Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(5), 72 Stat. 731, 737 (defining “aircraft” broadly to include “any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air”) (emphasis added).

186. 17 U.S.C. § 111(d).

187. See 37 C.F.R. § 201.17 (2000).

tion of phonorecords of nondramatic musical works as well as the distribution of digital audio under Section 114.¹⁸⁸

The agency's authority, however, extends far beyond the simple ministerial implementation of licensing regimes. Consider the Register of Copyright's responsibility to advise Congress and agencies during the consideration of amendments or in light of new developments in the market.¹⁸⁹ In this capacity, the agency has been integral to Congress's enactment of copyright-related legislation for decades, including the period before the 1976 Act and before passage of the Digital Millennium Copyright Act in 1998 ("DMCA").¹⁹⁰ Courts, moreover, are required to seek out the expertise of the Copyright Office in cases in which the accuracy of information in a copyright registration statement is contested.¹⁹¹

The Copyright Office also plays the important role of defining positive entitlements and duties as changes in communications technologies render the statutory language more ambiguous over time. They take such action through interpretive and legislative rulemakings. And courts routinely defer to the agency's interpretation of provisions of the Copyright Act at times of dramatic technological change.¹⁹² They have reasoned that Congress intended the Copyright Office to be the "administrative overseer" of the licensing regime under Section 111 in particular because of the characteristic dynamism of the market for communications technologies at issue in that statute.¹⁹³ No other entity in the federal government is more equipped to measure disruptive communication technologies against the terms of the Copyright Act than the Copyright Office.

Importantly, courts, too, have recognized as much. In 2012, a year before it issued its opinion in the *Aereo* case, the Second Circuit heard an appeal in which *ivi*, a company that provided web-based video streaming to users, sought a declaratory judgment that it is a "cable system" within the

188. See 17 U.S.C. § 114(d)(2) & (f).

189. See *id.* § 701(b)(1)–(2).

190. See, e.g., 144 Cong. REC. 24468 (daily ed. Oct. 8, 1998) (statement of Patrick Leahy referring to the "recommendations and hard work of the Copyright Office" in developing the DMCA).

191. See 17 U.S.C. § 411(b)(2) ("In any case in which inaccurate information . . . is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.").

192. See *Cablevision v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 609 (D.C. Cir. 1988) (citing *DeSylva v. Ballentine*, 351 U.S. 570, 577–78 (1956)).

193. *Id.* at 608; cf. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 771–72 (E.D. Pa. 2001) (deferring to the Copyright Office's interpretation of exemption under Section 114 pursuant to *Chevron*; explaining that "the Copyright Office could not exercise its duties and functions without the ability to interpret" the applicable statutory language in the context of new and evolving technologies). See generally 17 U.S.C. § 702 (2012).

meaning of Section 111.¹⁹⁴ With that designation, *ivi* would be entitled to retransmit broadcast signals as long as it pays the statutory fee for the benefit.¹⁹⁵ The Second Circuit rejected the claim, agreeing with broadcasters that the compulsory licensing provision under Section 111 does not “extend to Internet transmissions.”¹⁹⁶

The panel also turned to the Copyright Office’s conclusions on the matter to get a better sense of “Congress’s intent.”¹⁹⁷ It did so even though the agency was not a party to the litigation. Rather, the Copyright Office had published reports to Congress in which it repeatedly concluded that Internet transmissions do not count as a “cable system” within the meaning of the compulsory licensing regime under Section 111.¹⁹⁸ Indeed, in reports and testimony to Congress from late 1997 to 2011, the agency had determined consistently that internet streaming is not sufficiently like cable television service to be subject to the compulsory licensing provision.¹⁹⁹ Citing *Chevron*, the Second Circuit deferred to the Copyright Office’s assessment.²⁰⁰ The agency’s conclusion, the panel held, was reasonable and not otherwise barred by the statute.²⁰¹ I will return to this case in Part III below.

2. *The Communications Act*

The Copyright Act is not the only statute through which Congress legislates in the field of video distribution. When it amended the Communications Act in 1992, Congress set out an even more elaborate regime. Among other things, through that statute, Congress has tasked the FCC with administering a system for awarding licenses to broadcasters and rules that govern the markets for video distribution and programming.

With this authority, the FCC has had a major, if not decisive, role in making legal sense of novel video distribution technologies that were not known to lawmakers in 1934, when Congress first enacted the statute. For example, as cable television emerged in valley towns across the country in the late 1940s and 1950s,²⁰² the agency relied on the Communications Act to bar cable providers from importing distant broadcast signals into local

194. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 277–79 (2d Cir. 2012).

195. *See id.* at 278–79.

196. *Id.* at 282.

197. *Id.* at 282–83.

198. *Id.* at 283 (citing U.S. COPYRIGHT OFFICE, *supra* note 11, at 188; U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT § 302 REPORT 48 (2011)).

199. *Id.* (citing, *inter alia*, U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 97 (1997)).

200. *Id.* at 284–85.

201. *Id.* at 284.

202. Sylvain, *supra* note 151, at 827.

markets.²⁰³ Congress ratified the FCC's general regulatory approach in 1992 amendments to the Communications Act.²⁰⁴ It did so fully mindful of the public performance right and the statutory licensing regime in the Copyright Act; it observed that the new provisions modify neither "the compulsory copyright license established in section 111" nor "existing or future video programming licensing agreements between broadcasting stations and video programmers."²⁰⁵ The 1992 statutory amendments reformed the 1976 Act specifically to redress the remarkable shift in market definition caused by the real explosion of cable television in the 1980s.

Today, the Communications Act and the FCC's implementation of it embody the greater part of video distribution law. The FCC, however, has yet to speak definitively about how provisions of the Communications Act apply to internet-based video distribution in the way the Copyright Office has.²⁰⁶ In this subpart, however, I detail the steps the FCC has taken in this regard to underscore the extensive scope of existing public law in this area. I argue that courts should routinely incorporate, or at least acknowledge in their analyses of the current generation of video streaming cases, this expansive regulatory arrangement.

a. Retransmission Consent and Must-Carry

From the late-1940s to the mid-1960s, the FCC chose to impose a regulatory light touch on the new cable operator upstarts that were emerging across the country. The common view then was that "community antenna television," as it was called, supplemented broadcasting by relaying signals to low-lying valley communities.²⁰⁷ It did not matter that the new video distribution technology complicated the network-affiliate broadcast model of video distribution. The presumption (now, understood as a conceit) was that broadcasting could never really be displaced by the upstarts. Broadcasters in this early period did not have any doubt about their importance as public trustees of the airwaves.

By the mid-1960s, however, as cable service spread, the common wisdom changed. Cable was clearly becoming more than a supplement to broadcasting; it had become a gatekeeper to many local markets and a po-

203. *Id.* at 829.

204. 47 U.S.C. § 325(b)(1) (2012) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station . . .").

205. *Id.* § 325(b)(6); *see also* 17 U.S.C. § 111(b) (2012) ("[T]he secondary transmission to the public of a performance or display of a work embodied in a primary transmission is actionable as an act of infringement.").

206. *See supra* notes 186–201 and accompanying text.

207. *See Sylvain, supra* note 151, at 827.

tential competitor on video programming itself. It was displacing the centrality of broadcasting.

The FCC responded by promulgating rules that required cable operators to obtain the agreement of local stations to carry signals to subscribers in the local market.²⁰⁸ The agency also imposed pricing regulations on cable operators on the theory that they could abuse their new gatekeeping position in local markets by charging subscribers unreasonably high rates.²⁰⁹ Cable companies of course resisted these changes on the grounds that the FCC did not have the statutory authority to regulate them—that they were not broadcasters within the meaning of the Communications Act.²¹⁰ The agency had argued that it could regulate cable service because it is ancillary to a service it otherwise has the authority to regulate—broadcasting.²¹¹ The Supreme Court affirmed the agency’s interpretation.²¹²

In 1984, a little more than a decade and a half later, Congress lifted these FCC regulations in local areas where there was “effective competition.” The FCC subsequently defined this term broadly, allowing cable providers to operate in most local markets free from price regulation. The consequence of the 1984 amendment and its implementation by the FCC was a decade of high subscriber rates for cable service.²¹³

By the early 1990s, as consumer worries about the rate of increase in cable prices intensified, broadcasters and consumer groups agitated for more protective legislation. They set their sights on an amendment to the Communications Act that would effectively enlarge broadcasters’ leverage vis-à-vis cable operators and other “multichannel video programming distributors” (“MVPDs”).²¹⁴ The common view was that cable providers,

208. See, e.g., *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 ¶ 17 (1962) (denying transmitter permit application); *Authorizations in the Bus. Radio Serv. for Microwave Stations to Relay TV Signals to Cmty. Antenna Sys.*, No. 14895, *Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Serv. for Microwave Stations Used to Relay TV Broad. Signals to Cmty. Antenna TV Sys.*, No. 15233, 2 F.C.C.2d 725, 796–97 (1966) (adopting rules and regulations). See generally LELAND JOHNSON, *TOWARD COMPETITION IN CABLE TELEVISION* (1994); Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 102 (1996).

209. See *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968).

210. See *id.* at 172.

211. *Id.*

212. See *id.* at 181.

213. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(1), 106 Stat. 1460 (1992) (“Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. . . . The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.”).

214. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 336-37 (1993).

who, unlike broadcasters, had no positive responsibility to attend to the public interest, were drowning out free, over-the-air programming.²¹⁵

This push for reform succeeded. Legislators came to believe that, in spite of the 1976 compromise, broadcasters were airing content with disproportionately little benefit in return.²¹⁶ Cable operators now controlled access to local markets and reaped all of the advantages of the content that broadcasters were supplying. This, according to the Senate Committee Report on the bill that eventually became the new law, unsettled the very foundation of over-the-air broadcasting.²¹⁷ Free video programming, the Report explained, should never be “replaced by a system which requires consumers to pay for television service.”²¹⁸ The new law would give broadcasters a new entitlement that they could use as leverage in negotiations with MVPDs over retransmission terms. Among other things, for example, broadcasters and other content providers could negotiate to add new channels that providers would otherwise not carry.²¹⁹

Among other things, the Cable Television Consumer and Competition Act of 1992 requires cable operators to carry local broadcasters’ signals to local audiences if the local station elects to forgo negotiating on retransmission consent terms.²²⁰ Under the new law, moreover, cable operators cannot receive compensation for carrying local broadcast signals when a local broadcaster elects to be a must-carry station.²²¹ If, however, a broadcaster

215. *Id.* at 335.

216. S. REP. NO. 102-92, at 35 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 (observing that “the Committee . . . does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.”); *see also* Federal Communications Commission, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2965, 3004–05 (1993) (determining that the 1992 Cable Act “created a new communications right in the broadcaster’s *signal*, completely separate from the *programming* contained in the signal.” (emphasis added)).

217. S. REP. NO. 102-92, at 29, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

218. *Id.* at 30, *as reprinted in* 1992 U.S.C.C.A.N. at 1169.

219. *Id.* at 29, *as reprinted in* 1992 U.S.C.C.A.N. at 1168–69; *see also* 138 CONG. REC. S642-01 (daily ed. Jan. 30, 1992) (statement of Sen. Daniel Inouye) (“S. 12 permits the two interested parties—the station and the cable system—to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement.”).

220. Cable Television Consumer Protection and Competition Act § 6; 47 U.S.C. § 325(b)(1)(B) (2012) (retransmission consent provision which also creates exception for must-carry provision at 47 U.S.C. § 534(a) (2012)). The must-carry provisions essentially require cable service providers to carry a minimum number of broadcast signals based on the relative size of the local market. 47 U.S.C. § 534(a).

221. 47 U.S.C. § 534(b)(10). There are a variety of reasons that would compel a broadcaster to elect must-carry over retransmission consent. *See generally* CHARLES B. GOLDFARB, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE REPORT RL34078(2007), *available at* <http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RL34078.pdf>.

elects to proceed under the retransmission consent regime, cable television providers must settle on retransmission terms with broadcasters. In the absence of an agreement, the prior may not retransmit the latter's signal. Indeed, they must remove that broadcaster's signal from their offerings and, moreover, may not import the distant signal of another affiliate within the same network.

Crucially, this must-carry requirement rests on the popular faith (and, now, fiction) that "television broadcasting plays a vital role in serving the public interest."²²² The Supreme Court later ratified this view when, in response to a First Amendment challenge by cable operators, it held that the must-carry provisions are content-neutral and justified by a legitimate government interest in providing free, over-the-air public interest programming to consumers.²²³ Congress, the Court explained, decided that pay television could never displace this model.

Of course, in today's market, this account about free, over-the-air broadcasting is more romance than reality, as fewer people every year rely on television antennas to watch broadcast programs.²²⁴ Most viewers subscribe to cable or use their internet connection to watch programming at a time and place that is convenient.²²⁵

In any event, Congress found broadcasting important enough to renew the retransmission consent and must-carry provisions in 1999 and expanded them to cover direct broadcast satellite providers.²²⁶ The result is that, today, broadcasters are assured that cable operators and satellite providers will carry their signal. In this regard, the 1992 Act has done precisely what its proponents hoped; it has given broadcasters more leverage in their negotiations with MVPDs.

These new entitlements, however, have introduced an important new wrinkle in the political economy of video distribution. Ever since 1992,

222. S. REP. NO. 102-92, at 30 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133, 1174.

223. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224 (1997).

224. See Amendment of the Commission's Rules Related to Retransmission Consent, 76 Fed. Reg. 17071, 17072 (proposed Mar. 28, 2011) (to be codified at 47 C.F.R. pt. 76) ("Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace."). But see Emily Steel, *After Supreme Court Ruling, Aereo's Rivals in TV Streaming Seize Opening*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/business/media/after-supreme-court-ruling-aereos-rivals-in-tv-streaming-seize-opening.html>.

225. Cf. *Agape Church, Inc. v. FCC*, 738 F.3d 397, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[C]able regulations adopted in the era of *Cheers* and *The Cosby Show* are ill-suited to a marketplace populated by *Homeland* and *House of Cards*.").

226. See 47 U.S.C. § 335(b)(5)(A) (2012) (defining the term "provider of direct broadcast satellite service"); *id.* §§ 338, 614 (2012); see also Satellite Home Viewer Improvement Act of 1999 (Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999), Pub. L. No. 106-113, Appendix I, § 1009(a), 113 Stat. 1536, 1501A-537-38.

broadcasters and other video content producers have routinely held-up popular time-sensitive programming (like major professional sports events) when it comes time to negotiate new retransmission terms.²²⁷ They do so to extract additional commitments from operators, including the promise to carry new or unpopular channels or to pay more per-subscriber fees for the channels they do carry.²²⁸

Recognizing this moral hazard, in 1999 amendments to the Communications Act, Congress required the FCC to ensure that broadcasters negotiate with cable and satellite providers in good faith.²²⁹ Congress later imposed the “good faith” obligation on the cable operators and broadcasters a few years later. The agency has yet to use this authority, however, to protect subscribers from the game of chicken that broadcasters play with cable operators whenever retransmission terms are up for renewal. Congress is considering an array of reforms in light of the lack of action from the FCC on the “good faith” provision. The Video CHOICE (Consumers Have Options in Choosing Entertainment) Act, for example, would put an end to broadcast networks’ blackouts during contract negotiations over retransmission terms.²³⁰ This proposed bill would also forbid broadcasters from leveraging their popular networks to force cable operators to carry affiliated but less popular cable networks.²³¹

b. Program Access

Must-carry and retransmission consent represented significant reforms to video distribution law. Like the public performance right and the statutory license, however, they comprise only a fraction of the whole public law in the legislative field of video distribution. Congress in 1992 also amended the Communications Act to prohibit MVPDs from “engag[ing] in unfair

227. See, e.g., Ted Johnson, *DirecTV Refuses to ‘Bail Out’ Time Warner Cable in Dodgers Standoff*, VARIETY (July 29, 2014), <http://variety.com/2014/tv/news/dodgers-tv-standoff-time-warner-cable-says-yes-to-arbitration-but-directv-doesnt-bite-1201270994/>; Chloe Albanesius, *Cablevision Sues Viacom Over Channel Bundling*, PC MAGAZINE (Feb. 26, 2013), <http://www.pcmag.com/article2/0,2817,2415967,00.asp>.

228. See, e.g., Albanesius, *supra* note 227; David Wharton, *PGA Championship faces CBS blackout for Time Warner Cable customers*, LA TIMES (Aug. 7, 2013), <http://www.latimes.com/sports/sportsnow/la-sp-sn-pga-championship-cbs-television-blackout-20130807,0,7602876.story#axzz2bNyTEHFj>.

229. 47 U.S.C. § 325(b)(3)(C)(ii).

230. H.R. 3719, 113th Cong. (2013); cf. Joe Flint, *Proposed Bills Seek to Rewrite Media Rulebook*, L.A. TIMES (Dec. 12, 2013), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-proposed-bills-media-rules-20131212,0,2826769.story#axzz2nIXEN9ut>.

231. Another bill, the Next Generation Television Marketplace Act, would reform retransmission consent and compulsory licensing rules. H.R. 3720, 113th Cong. (2013). Cf. Alex Ben Block, “Two Bills Introduced in Congress to Stem TV Blackouts,” HOLLYWOOD REPORTER (Dec. 12, 2013), <http://www.hollywoodreporter.com/news/two-bills-introduced-congress-stem-665429>.

methods of competition or unfair or deceptive acts or practices.”²³² The statute further requires the FCC to implement program access regulations that elaborate on this restriction.²³³

Of course, as the statute was drafted in the early 1990s, it is not clear whether Congress meant to include online video distributors within the scope of the statute. The statute defines an MVPD as:

a person such as, but not limited to, a cable operator, a multi-channel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.²³⁴

While the list in the definition is helpful, it is only illustrative; it is not exhaustive of covered providers. It therefore leaves the legal obligations owed by and to the variety of emergent online video providers today in legal limbo, at least for now.

The difficulty in the statute is in its reference to “channels.” The question is whether online video providers supply “multiple channels of video programming” in the same way that cable providers do within the meaning of the Communications Act?²³⁵ The FCC has had the occasion to answer the question in the context of a dispute arising out of a video programmer’s decision to prematurely terminate its licensing arrangement with Sky Angel, an operator of a subscription service that distributes the content of television networks in real time to televisions equipped with internet-connected set-top boxes.²³⁶ The agency has tentatively rejected Sky Angel’s complaint about the termination, explaining that, based on the evidence before

232. 47 U.S.C. § 548(b).

233. *Id.* § 548(c). *See generally* 47 C.F.R. § 76 (1998), (FCC rules governing competitive access to cable programming).

234. 47 U.S.C. § 522; *see also* 47 C.F.R. § 76.1000(e) (defining MVPD as “an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming”).

235. *See* 47 U.S.C. § 522(13). Most notable among the newest generation of upstarts is Sky Angel, an operator of a subscription service that distributes the content of television networks in real time to televisions equipped with internet-connected set-top boxes. The company enters into contracts with broadcasters and other video content producers like Discovery and Disney, for example, to supply content to its subscribers who, in turn, can watch the programming on their television as it hits the airwaves. In this way, Sky Angel provides a service that is similar to that of traditional cable operators. The significant difference is that, even while their subscribers watch the programs on high-definition televisions, Sky Angel transmits the programming to subscribers over the Internet.

236. Sky Angel U.S., LLC, 25 FCC Rcd. 3879, 3880 ¶ 4, 3883 ¶ 7 (2010) (emergency petition for temporary standstill). The video programmer involved in the dispute, Discovery Holding Company, qualifies as a competitor MVPD because its owner has a significant stake in such companies. *See* News Corp., 23 FCC Rcd. 3265, 3273 ¶ 12 (2008) (noting the stakes of Discovery’s officers and directors in a competing MVPD, Liberty Media Corporation).

it, “Sky Angel does not provide its subscribers with a transmission path,” as the agency has interpreted the word.²³⁷ But the agency’s conclusion, again, was tentative; it was only replying to Sky Angel’s request for a “temporary standstill” of the arrangement between it and Discovery, the content provider involved in the dispute. The FCC has yet to enter a final order in the case.

This is no surprise. The language of the statute is not clear. Nor, as in *Aereo*, is it clear what the correct answer ought to be as a matter of law. Indeed, since the dispute raises novel questions about a disruptive technology that the pertinent statute and regulations could not anticipate, the FCC in 2012 opened a proceeding in which it invited public comment on the scope of the program access rules.²³⁸ That proceeding and the adjudication that instigated it remain open today, to the frustration of Sky Angel, which recently had to suspend its video distribution services.²³⁹ There is little question that there are substantial competition concerns at stake.²⁴⁰ But, again, it is not at all evident in the language of the statute or pertinent regulations how these disputes ought to be resolved as a matter of existing law. All eyes now are on the FCC to resolve the question.

All of this work deserves far more consideration than courts were willing to give it in the public performance cases. It is one thing to ask courts to be more respectful, and another to determine how they should implement that deference as a matter of course. I take up that challenge in Part III below.

III. DISRUPTION AND DEFERENCE

As I show above, in Part II, the task of determining whether unlicensed online video streaming of free, over-the-air broadcast programming infringes on broadcasters’ public performance rights is complicated. It cannot be done well simply by examining the plain text or specific legislative history of the Transmit Clause. The pertinent statutes are like pieces of a 1,000-piece jigsaw puzzle. Each piece furthers a specific objective that complements the others.²⁴¹ Putting the pieces together, however, requires

237. *Sky Angel*, 25 FCC Rcd. at 3883 ¶ 7.

238. Media Bureau, 27 FCC Rcd. 3079, 3082 ¶ 6 (Mar. 30, 2012) (notice).

239. See Supplemental Comments of Sky Angel U.S., LLC, Nos. 12-80 & 12-83, (F.C.C. June 10, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521313509>.

240. Consider that Sky Angel has brought antitrust claims against other video programmers who have also prematurely terminated their arrangements with the online video provider. The D.C. Circuit dismissed Sky Angel’s claim against the National Cable Satellite Corporation for pulling C-SPAN from its lineup, but only because Sky Angel did not plead sufficient facts to establish “concerted action,” not because the motivating concerns were not anticompetitive. See *Sky Angel v. Nat’l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 101–02 (D.D.C. 2013).

241. See *supra* Part II.B.

knowledge of where the others fit. Congress gave to the Copyright Office and the FCC the assignment of making sense of these various pieces when new technologies emerge.

In the recent cases involving *Aereo* and *FilmOn*, however, federal judges did not convey anything but unwavering confidence in their institutional capacity and authority to determine the scope of the Transmit Clause.²⁴² The courts interpreted the provision, unbothered by the various provisions and agency interpretations that bear on the question.

In this Part, I propose that judges be far more mindful of their institutional authority and capacity than they have been in this setting. Scholars have studied the relative roles that courts, legislators, and agencies play when reviewing controversies across substantive areas associated with networked information technologies. They have not, however, directed the same attention to defining the courts' authority or capacity to resolve disputes as complex and agency-involving as video distribution. This Part rectifies this silence by drawing on principles in administrative law doctrine.

A. *Judicial Deference Generally*

There are two basic reasons for deference in judicial interpretation of public law. First, courts consider deferring when they assume that there is a nontrivial risk that they might make a mistake about the substantive issue in dispute. Even if their epistemic error can later be cured, their intervention could be destabilizing in the interim. Accordingly, a court will defer if it also believes that another institution (that is, a legislature, an agency, or standard-setting organization) has a greater institutional capacity or expertise to make the right decisions in the given subject matter. Thus, *A* will elect to abide by *B*'s prior conclusion on the same question even though *A* might have resolved the issue differently in the first instance.²⁴³ Implicit in this conception is the recognition that *A* always has the freedom to decide whether it should defer to the prior decision by *B*, but that *B* is far likelier to get it right in the first instance.²⁴⁴

The second reason for deference is institutional. Deference in these cases is an explicit recognition that certain institutions are *by design* responsible for enacting a limited range of laws or rules in the first instance. This means *A* will defer to *B* because the former *is A* and the latter *is B*.²⁴⁵ It

242. See *supra* Part I.D.

243. See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008).

244. See *id.* at 1075.

245. See *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's con-

does not matter whether *B* is, from *A*'s perspective, right or wrong as a substantive matter.²⁴⁶

Separation of powers and democratic legitimacy are constitutional principles that impose formal limits on judges' authority to make legal decisions irrespective of what the best substantive resolution is.²⁴⁷ The concept of separation of powers associates each of the branches of government with a specific and mutually exclusive role in federal governance. This structural arrangement reflects the negotiated balance reached during the founding period as well as a more general view of how constitutional democracies ought to function.²⁴⁸

Democratic legitimacy, on the other hand, requires constituencies to validate the public laws by which they must abide. Under this conception, the elected branches are presumed to be superior to courts at resolving contested policy questions.²⁴⁹ They are accountable to, and representatives of, defined constituencies.²⁵⁰ At least theoretically, elections are the mechanisms through which elected officials stay in tune with constituents' interests. Federal courts, on the other hand, have no such constituencies and, as a result, no obligation to heed majoritarian demands on substantive outcomes. Independent agencies are generally sheltered from the vagaries of electoral politics, but not as removed (or antimajoritarian) as courts are by design. They, like elected officials, are better able to "set[] the dimensions of social policy that may involve trades among the interests of broad groupings of citizens," while "judges' strengths lie in resolving discrete controversies between individuals, in which one wins, another loses, and broad social adjustments are secondary to the outcome of their concrete dispute."²⁵¹

The doctrine of judicial review of agency action in administrative law embodies these two background constitutional norms: separation of powers and democratic legitimacy. The Supreme Court's opinion in *Chevron v. Natural Resources Defense Council*²⁵² stands as the principle statement on these two norms. Under the *Chevron* doctrine, judges defer to agencies'

struction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." (footnote omitted)).

246. *See id.* at 845.

247. *Id.* at 842–45.

248. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629–30 (1952) (Douglas, J., concurring); *see also* JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, §§ 143–44, 150, 159 (Simon & Brown 2012) (1690).

249. *Chevron*, 467 U.S. at 865–66.

250. *Id.*

251. Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1257 (1992).

252. 467 U.S. 837 (1984).

substantive implementation of ambiguous statutes on the assumption that the agency officials who have been thinking longest and most systematically about the given problem are likely to have the most prudent policy solution.²⁵³ To be sure, courts will reject the agency action when it conflicts with congressional intent.²⁵⁴ But courts will defer to an agency's judgment if they find that the agency action at issue reasonably accommodates competing interests, "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."²⁵⁵ These elements are characteristic of the work that many agencies undertake. It is presumably for this reason that judicial reversals of agency action under *Chevron* are much less frequent than judicial affirmation.²⁵⁶

Public choice critiques have not diminished Congress's continued delegation to agencies and courts' concomitant deference to agency action.²⁵⁷ To the contrary, Congress continues to delegate a wide range of responsibilities to agencies; agencies, in turn, have developed a variety of regulatory tools to implement legislative priorities.²⁵⁸ Among other things, agency officials collect information about fields as they change, report on those findings to legislators and other policymakers, and adapt laws to changing circumstances. Agencies are generally well-equipped to undertake these responsibilities in spite of concerns about regulatory capture and self-dealing.²⁵⁹

Courts accordingly honor the various forms through which agencies implement public law by deferring, or at least respecting, the latter's efforts as a matter of course. That is, courts have not adopted a one-size-fits-all regime of deference after *Chevron*. Instead, they tailor their scrutiny of agency action to each case and legislative field. Under current doctrine, the level of deference courts give to agencies falls somewhere along a spectrum or

253. *Id.* at 865–66.

254. *See, e.g.,* *Verizon v. FCC*, 740 F.3d 623, 634–35 (D.C. Cir. 2014).

255. *Chevron*, 467 U.S. at 865 (footnotes omitted).

256. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673, 696 n.91 (2007).

257. *See, e.g.,* *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1874–75 (2013) (holding that courts must defer under *Chevron* to an agency's determination that it has jurisdiction to interpret an ambiguous statute). *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17–18 (2010).

258. *See* *United States v. Mead*, 533 U.S. 218, 227–31 (2001) (discussing when *Chevron* deference applies).

259. *See* Barkow, *supra* note 257.

“continuum.”²⁶⁰ The level of deference given depends on the agency action under scrutiny, the specific statutory authority on which the agency bases its action, and the relative or unique institutional expertise the agency has brought to bear.²⁶¹ On one end of this spectrum, there are cases in which courts ignore, are indifferent to, or are altogether skeptical about the agency’s interpretations generally. These are cases where Congress has unambiguously decided not to confer lawmaking authority to an agency or where courts have traditionally assumed the authority to decide this kind of dispute in the first instance.²⁶² In these cases, courts apply a “pragmatic, multi-factored methodology” that considers “statutory text and the whole act; legislative history and statutory purpose; the evolution of the statute through judicial and other precedents; and substantive policy canons.”²⁶³ At the other end are cases involving a statute through which Congress has delegated primary and nearly exclusive lawmaking authority to an agency. In these latter cases, courts assume a far more deferential posture.²⁶⁴ But the amount of deference a court gives to an agency can vary widely, from “consultative” to “super deference,” depending on the nature of the authority at issue.²⁶⁵

In the context of video distribution, Congress delegated specific authority to the Copyright Office and FCC. These agencies are tasked with calibrating the implementation of the Copyright Act and the Communications Act, respectively, as new and unanticipated technologies emerge. Over the years, Congress has given these agencies broad authority to make legal sense of new technologies in the first instance. I outline those duties here, based on my account in Part II.

Reporting. Both agencies are explicitly charged with the task of collecting information from stakeholders about the state of affairs in video distribution. That is, they collect information about prevalent market uses, consumer habits, judicial interpretations, and emergent technologies. They play this role, again, because there is only so much that Congress can do in this legislative field. In any event, agencies are far better equipped and staffed to collect such information. But Congress also has charged both agencies with the responsibility of reporting their findings to legislators,

260. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1089–90 (2008).

261. *Id.* at 228.

262. See *infra* Part III.B (discussing electronic surveillance).

263. See Eskridge & Baer, *supra* note 260, at 1117.

264. See *infra* Part III.B (discussing broadband network management).

265. See Eskridge & Baer, *supra* note 260, at 1098–99.

other federal agencies, and, on request, to courts. This role is precisely the sort of task an agent for Congress should undertake.²⁶⁶

Adapting Current Laws. Both agencies also have the authority to promulgate rules and offer guidance on substantive questions when the governing statute is ambiguous or unclear. They do this in ways that Congress, as a practical matter, simply cannot. Above, in Part II, I discussed at least two examples that showcase this important feature of their responsibilities administration: first, the FCC's rulemakings addressed to cable operators and broadcasters in the 1960s and, second, the Copyright Office's consistent determination over the course of the past decade and a half that internet transmissions are not included in the compulsory licensing regime. In both cases, the agencies promulgated a rule or interpretation to fill a legislative gap until Congress formally amends the old statute or enacts a new one to resolve a substantive ambiguity occasioned by the emergence of a disruptive new video distribution technology like online streaming.

Convening. Hand-in-hand with the responsibility of collecting information is the important role both agencies have in convening discussions and negotiations between the various stakeholders in the field. Congress has given to the FCC in particular broad authority to arbitrate or mediate disputes. In this capacity, the FCC is best positioned to understand the relative priorities of service providers, consumer advocacy groups, and technologists. The FCC's rulemaking proceedings also operate as opportunities for the various stakeholders to convene formally. The agency, in turn, relies on the exchange of ideas to formulate policy that is presumably reflective of the various rival interests.

Expertise. Finally, over the years, the Copyright Office and the FCC have developed a uniquely deep understanding of the nature of communication markets. The FCC in particular has lawyers, economists, and technologists on staff to elucidate new developments and trends. The Copyright Office, on the other hand, operates as a convener, a research arm for Congress, and an administrator for licensing regimes across substantive areas. Both agencies have acquired this deep level of knowledge in ways that exceed anything close to what Congress or the courts have.

Together, these various activities paint a picture of broad responsibility. Over time, Congress has actively chosen to give the Copyright Office and the FCC substantial power to make sense of new communications technologies as they emerge. Because Congress has given the FCC and the

266. While the Copyright Office has the responsibility to report to Congress and the courts on copyright related matters, it is a subordinate agency within the Library of Congress. See 17 U.S.C. § 701(a) (2012). The current Register of Copyrights and her predecessor are on record as advocating the restructuring of the Copyright Office as an independent agency. See Letter of Maria A. Pallante, Register of Copyrights, to Representative John Conyers, Jr. (Mar. 23, 2015).

Copyright Office these powers, courts have accordingly afforded deference to those agencies on the scope of video distribution law.

B. Judicial Deference and Communication Technologies

Institutional authority and capacity are not the only justifications for judicial deference. Different substantive areas warrant different kinds of expertise. In the context of copyright law, courts are reluctant to expand existing copyright protections to novel communication technologies “without explicit legislative guidance.”²⁶⁷ The Supreme Court affirmed this principle in *Sony v. Universal City Studios*.²⁶⁸ In *Sony*, it found that manufacturers of videocassette recorders are not secondarily liable for viewers’ reproduction of copyright protected television programs.²⁶⁹ It determined that users generally record those programs for their personal use (that is, they “time-shift”).²⁷⁰ The Court held that these “substantial noninfringing uses” do not cause the requisite level of harm to the copyright owners.²⁷¹

The *Sony* Court explained that judges are generally less capable of “accommodat[ing] fully the varied permutations of competing interests that are inevitably implicated by such new technology” than Congress is.²⁷² It cited the well-established view “that the protection given to copyrights is wholly statutory.”²⁷³ The Court noted that this is why courts have been reluctant “to expand the protections afforded by the copyright without explicit legislative guidance.”²⁷⁴

The 1976 Copyright Act itself is evidence of this interaction between courts and Congress. The *Sony* Court cited *Teleprompter* and *Fortnightly*, both overturned by the Act, as cases that triggered a legislative fix to the statutory public performance right.²⁷⁵ Courts accordingly, the *Sony* Court noted, must err on the side of caution before broadening protections. “Sound policy, as well as history,” the Court explained, “supports our consistent deference to Congress when major technological innovations alter

267. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 431 (1984) (citing, inter alia, *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974) and *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968)); see also *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913, 965 (2005) (Breyer, J., concurring) (citing *Sony*, 464 U.S. at 431).

268. 464 U.S. 417, 446–47.

269. *Id.*

270. *Id.* at 449–50.

271. *Id.* at 456.

272. *Id.* at 431.

273. *Id.*

274. *Id.*

275. *Id.* (citing, inter alia, *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974) and *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968)).

the market for copyrighted materials.”²⁷⁶ It asserted as much even as the fair use analysis is characteristically fact-intensive and best suited to adjudication.²⁷⁷

But, to be sure, the reasoning in *Sony* is not what most students of administrative law generally associate with the idea of deference. As I outlined above, deference, at least as it comes up in administrative law doctrine, refers to the posture courts assume when Congress has charged an agency with interpreting or implementing the statutory regime at issue in a case. *Sony* was not about that kind of deference. The dispute in *Sony* concerned a question—the scope of the fair use defense²⁷⁸—that courts have assumed the responsibility of resolving in the first instance.²⁷⁹ But it was during the course of its fair use analysis that the Court explicitly second-guessed its own capacity and institutional authority to stretch the law to apply to the new technology at issue.²⁸⁰ It expressed this reticence as deference to Congress.

That same principle should have applied in the cases involving *Aereo* and *FilmOn*, but it did not. Indeed, after reading *Aereo*, one might think that courts need not be so deferential to Congress or agencies generally when they adjudicate disputes involving novel communication technologies. In their opinions, neither Justice Breyer nor Justice Scalia for a second considered whether the Court was the right forum to decide in the first instance whether the Transmit Clause reaches online video streaming—a technology that was unknown to most people until just a few years ago.²⁸¹ Their assumption was that courts have the authority to and are capable of

276. *Id.*; cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (“[O]ne might claim that courts, when interpreting statutes, should assume in close cases that a decision with ‘enormous social consequences’ should be made by democratically elected Members of Congress rather than by unelected agency administrators.” (citation omitted)).

277. See *Monge v. Maya Magazines*, 688 F.3d 1164, 1170–71 (9th Cir. 2012) (discussing *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass 1841)). The fact-specific nature of the fair use analysis remains a point of great consternation for many courts, scholars, and practitioners because of how unpredictably and inconsistently it has been applied. See, e.g., *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (noting that “the issue of fair use . . . is the most troublesome in the whole law of copyright”); 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 12.1 (2013); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990); Mazzone, *supra* note 9, at 398–403; David Nimmer, “*Fairest of them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003); Parchomovsky & Weiser, *supra* note 9, at 126–28.

278. *Sony*, 464 U.S. at 447–51.

279. But see Mazzone, *supra* note 9, at 414–15.

280. See *Sony*, 464 U.S. at 430 (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”).

281. See *supra* Part I.D.

resolving such disputes by simply examining no more than the statutory provision in dispute.

This proposition sounds right for two reasons. First, Congress has not delegated to any agency the authority to implement the Transmit Clause in the way it has delegated administrative authority to implement other statutory provisions like, for example, Section 111 of the Copyright Act. Second, courts cannot abdicate their positive responsibility of adjudicating disputes brought before them. At a minimum, they must resolve whether a case is justiciable in the first place. They must decide, for example, whether there is a ripe controversy worthy of their attention or whether they have jurisdiction to hear the matter. They cannot defer those questions to any other institution.

More generally, courts routinely decide how to interpret contested terms without consulting other institutions. They decide which resources or kinds of authorities are worth considering and following. Courts decide, for example, whether and to what extent legislative history or other evidence of congressional intent matters when determining the scope of a substantive right or obligation.²⁸² They do this as a matter of interpretive judicial philosophy *ex ante*²⁸³ or because, pursuant to the statutory provision at issue, they must consider certain legislative factors in their analysis.²⁸⁴ Or they decide that they should review certain agency actions in a certain way.²⁸⁵ That is, pursuant to their native duty to say what the law is, they devise standards of judicial review and deference to account for constitutional or institutional considerations unmentioned in the legislation at issue.²⁸⁶

We might assume that it is with this background in mind that the courts in the cases involving *Aereo* and *FilmOn* appeared to have taken it as an article of faith that they could and should decide what Congress meant by including the term “publicly” in the definition of performance in the Transmit Clause. But the decision about how to interpret contested terms is not as obvious or unimportant as the *Aereo* opinions’ silence on the matter suggests. In cases involving disruptive networked communications tech-

282. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1266 (2011) (“Those of us who make use of legislative history . . .”).

283. ANTONIN SCALIA & BRYAN A. GARNER, *SCALIA & GARNER’S READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

284. *See, e.g., Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 484–85 (1951) (discussing standards under the Taft-Hartley Act, 29 U.S.C. § 141 (2012)).

285. *See, e.g., Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Universal Camera*, 340 U.S. at 487.

286. *See generally* GELLHORN & BYSE’S *ADMINISTRATIVE LAW* 927 (Strauss et. al eds., 2011) (discussing Clarke Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 193 (1981) and Ernest Gellhorn & Glen O. Robinson, *Perspectives in Administrative Law*, 75 COLUM. L. REV. 771, 780–81 (1975)).

nologies generally, courts routinely convey humility, or at least self-awareness, about the limits of their institutional authority or capacity.

Much more recently, courts have done this in cases involving issues as disparate as electronic communication surveillance by law enforcement officials on the one hand, and broadband network management practices of internet service providers on the other. As to electronic surveillance, courts have not hesitated to say in the first instance what the Fourth Amendment allows.²⁸⁷ Yet, even in this area, the Supreme Court has wrung its hands demonstrably about whether it or Congress is better suited to defining the scope of privacy protection in cases involving technologically novel surveillance techniques.²⁸⁸ They do this notwithstanding their uncontroverted exclusive authority to interpret constitutional provisions.²⁸⁹ They even have invited Congress to provide guidance on how to define privacy in recent cases involving surveillance techniques that rely on novel networked communications technologies like location tracking.²⁹⁰ And, yet, at the same time, courts have recognized that they are at the peak of their institutional authority when they are asked to resolve disputes about the substantive scope of a constitutional right. Outside of a narrow range of statutes through which Congress has delegated policymaking authority to federal law enforcement officials to define the contours of statutory privacy rights,²⁹¹ agencies do not have an articulated responsibility to define the scope of protection from electronic surveillance under the Fourth Amendment.²⁹²

The governance of local internet service providers, on the other hand, is very different from the governance of law enforcement surveillance techniques. Importantly, local broadband network management is not a constitutional matter. As technologies change, the FCC implements the objectives set out in the Communications Act through a wide range of regulatory

287. See, e.g., *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); see also *United States v. Jones*, 132 S. Ct. 945, 952 (2012); *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001).

288. See, e.g., *Jones*, 132 S. Ct. at 963–64 (Alito, J., concurring).

289. See Olivier Sylvain, *Failing Expectations: Fourth Amendment Doctrine in the Era of Total Surveillance*, 49 WAKE FOREST L. REV. 485, 512–14 (2014).

290. See, e.g., *Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (“[C]oncern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions.”). Justice Alito flatly observed in his concurring opinion in *Jones* that, “in circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.” *Id.* at 964.

291. See, e.g., Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

292. Of course, this is not to say that agencies do not have some rulemaking authority on privacy law outside of law enforcement surveillance. See, e.g., Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996); Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005).

activities.²⁹³ Nevertheless, the federal courts have not hesitated to define or reflect on the obligations of internet service providers under the Communications Act.²⁹⁴ They have done so, however, within the bounds of transsubstantive deference doctrines and administrative law doctrine generally.²⁹⁵ Courts have decided that the agencies to which Congress has delegated authority are best situated to interpret the pertinent statutory terms.

As to both areas, electronic surveillance and broadband network management, courts are always explicitly mindful of the limits of their relative institutional authority and capacity. Scholars of these two areas in particular, too, have attended to the courts' relative institutional role.²⁹⁶

C. Towards a Theory of Implied Delegation in Video Distribution Law

1. Deference in Action

Should we treat the Transmit Clause as a provision that courts have the exclusive responsibility of elaborating in the first instance (like the Fourth Amendment)?²⁹⁷ Or is it more like a provision in a regulatory regime that a federal agency has the delegated authority to administer (like that set out in the Communications Act)? Or does it fit somewhere in between?

Chevron does not really answer those questions, but another canonical Supreme Court case in modern administrative law doctrine provides important guidance. In *United States v. Mead*,²⁹⁸ the Supreme Court identified the various considerations that judges must generally take into account when deciding whether to defer or what level of deference courts should give to agencies.²⁹⁹ The *Mead* Court held that courts must inquire into how

293. See 47 U.S.C. §§ 151, 154(i), 157, 1302(a) (2012); see also *id.* § 201(b) (authorizing the agency to “prescribe such rules and regulations as may be necessary in the public interest to carry out” provisions of the statute).

294. See, e.g., *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

295. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–84, 991 (2005) (applying *Chevron* to agency interpretation of definitional terms in Communications Act); cf. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1870–72 (2013) (applying *Chevron* to agency interpretation of jurisdictional provision).

296. See generally Kerr, *supra* note 9; Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1958 (2013); Sylvain, *supra* note 151, at 795; Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205, 259–61 (2010).

297. To be sure, the Copyright Clause in the Constitution does not engage courts in the way the Fourth Amendment warrant requirement does. The latter enlists courts to measure executive overreach. The former, on the other hand, explicitly authorizes Congress to “promote the Progress of Science and useful Arts” by setting “limits” on creators’ exclusive rights to their copyrighted works. U.S. CONST. art. I, § 8, cl. 8. But that structural difference went unnoticed in the majority and dissenting opinions in *Aereo*.

298. 533 U.S. 218 (2001).

299. *Id.* at 227–34.

and whether Congress intended to delegate to the Customs Office the authority to implement the Harmonized Tariff Schedule of the United States before scrutinizing the validity of the agency's action.³⁰⁰ If a court finds no such intention, then it will be less deferential than required under *Chevron*.³⁰¹ Courts only have to consider "the thoroughness" of the agency's analysis, "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."³⁰²

After *Mead*, one of the key questions for federal courts is whether Congress has one way or another delegated to the agency at issue the authority to interpret and administer an ambiguous provision with the "force of law."³⁰³ Deference—whether obedience or simply weighty consideration—will depend on whether the agency's interpretation is "made in pursuance of official duty" and premised on "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."³⁰⁴

This inquiry, sometimes called *Chevron* Step Zero,³⁰⁵ must come before the reviewing court analyzes the substantive merits of the agency action at issue. The Court in *Mead* explained that an agency can manifest its expertise in a "great variety of ways."³⁰⁶ Depending on what the governing statute allows, an agency may manifest congressional intent by rulemaking, adjudication, enforcement, or any other number of methods.³⁰⁷ Courts, meanwhile, must be prepared to honor "the spectrum of possible agency action" that Congress has permitted.³⁰⁸ Deference, the Court explained, must be "tailor[ed]" to the variety of forms that agency action may take.³⁰⁹ Otherwise, courts would be unresponsive to the range of regulatory strategies that Congress pursues to further complex legislative purposes.³¹⁰ *Mead* in this regard encourages agencies to be flexible in undertaking their delegated authority and, just as importantly, requires courts to consider the "variety of ways" in which Congress may have implicitly delegated to an agency the

300. *Id.* at 226–28; see also *Brand X*, 545 U.S. at 983 (discussing *Mead*).

301. *Mead*, 533 U.S. at 226–28; see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–87 (2000).

302. *Mead*, 533 U.S. at 228 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

303. *Id.* at 226–27, 229.

304. *Skidmore*, 323 U.S. at 139.

305. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006).

306. *Mead*, 533 U.S. at 235–36.

307. *Id.* at 236.

308. *Id.*

309. *Id.*

310. See *Stinson v. United States*, 508 U.S. 36, 44 (1993).

power to implement the statute at issue.³¹¹ This rule does not compromise judicial authority to scrutinize agency action, as much as impose on courts the sensible duty of being self-aware of the limits of their interpretive authority.³¹² The doctrine has courts choose between obeying the agency interpretation at issue, treating the agency view on the matter as a “constituent element[] of its own decision, as persuasive if not controlling,” or “as simply irrelevant.”³¹³

2. *An Alternative to Indifference in Aereo*

The various courts that heard the recent disputes involving Aereo and FilmOn did not consider the question of whether they ought to consult legal analysis of online video distribution by the Copyright Office or the FCC.³¹⁴ In their silence, the courts seemed to presume that they alone have the authority or capacity to define the scope of protection under the Transmit Clause.

As a formal matter, they are not necessarily wrong. Congress did not explicitly delegate the authority to interpret the Transmit Clause to any institution and, under current doctrine, federal courts are not obliged to apply *Chevron* deference to an agency interpretation unless Congress manifests an intention to authorize that agency “to be able to speak with the force of law.”³¹⁵ Neither the Copyright Office nor the FCC have an explicit obligation under the Copyright Act to fill gaps in the Transmit Clause or promulgate binding legal rules that interpret the public performance right. It is likely for this reason that courts did not convey any doubt that they could ignore statements by the Copyright Office or the FCC on how to treat online video distribution.³¹⁶ For the courts, those agencies are no more than ladies-in-waiting, to be ignored until a litigant challenges their interpretations in court.

But existing doctrine, especially after *Mead*, does not require that courts be inattentive to agency interpretations of public law in fields about which Congress has assumed that they are expert.³¹⁷ While there is no ex-

311. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1003–05 (2005) (Breyer, J. concurring) (discussing *Mead*).

312. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944); *see also Mead*, 533 U.S. at 234 (quoting *Skidmore*).

313. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 822–23 (2001).

314. *See supra* Part I.D.

315. *Mead*, 533 U.S. at 229.

316. The matter would have been different if the litigants had argued or briefed the point.

317. *Cf. Mead*, 533 U.S. at 226–27, 229 (“It can be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in

plicit delegation of authority to interpret the Transmit Clause, one can infer from the Copyright Act that the Copyright Office has the authority to make sense of that provision when new technologies emerge. This seems especially sensible in the video distribution context, where the Copyright Office and the FCC have been, and must be, very active.

As I explained above, pursuant to legislative command,³¹⁸ the Copyright Office and FCC have issued reports and administered proceedings on how disruptive emergent online video streaming applications are and whether they square with the terms of current law.³¹⁹ To be sure, these agencies have not had the occasion (never mind the explicit authority) to say anything about how or whether unauthorized online video streaming of broadcast programming infringes broadcasters' public performance right under the Transmit Clause. But the Copyright Office and the FCC have committed substantial resources and their expertise to the general question on which the *Aereo* majority rested its holding: whether online streaming is like cable television service. Before the Court decided *Aereo*, both agencies decided that online video distribution is *not* sufficiently like cable to warrant protection under at least two other related provisions under the Copyright Act and the Communications Act.³²⁰

It is peculiar that existing doctrine could allow courts to ignore the substantial efforts that the Copyright Office and the FCC have expended on the point. At a minimum, nothing in *Mead* or administrative law doctrine generally forbids courts from entertaining their conclusions.

One might even assume that current administrative law doctrine *empowers* courts to consider agency interpretations of related provisions in the legislative field. There are at least two reasons for this. First, courts defer to agency interpretations even when they are not a party to the litigation before them. This is true across different substantive areas, including matters related to the *Aereo* and FilmOn video distribution applications. Consider again the *ivi* case.³²¹ In *ivi*, in a dispute concerning the scope of coverage of the compulsory licensing provision, the Second Circuit deferred to the Copyright Office's repeated determination that online video applications are not like cable and, therefore, not entitled to a compulsory license to retransmit

the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."); see also *Skidmore*, 323 U.S. at 139.

318. See *supra* Part II.

319. See *supra* Part III.A.

320. See *supra* Part II.B.

321. See *supra* notes 192–199 and accompanying text; see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

broadcast programming.³²² The panel reached this conclusion even though the Copyright Office was not a party to the litigation. The agency's delegated authority and expertise in the legislative field were enough to warrant deference.³²³

Second, in *Mead*, the Court sought to accommodate the variety of ways in which Congress grants authority to agencies.³²⁴ Sometimes Congress delegates to agencies the responsibility of promulgating rules that carry the force of law. Courts will give such agency actions *Chevron* deference. Sometimes, however, Congress allows agencies to make "interpretive choices" that do not bind judges.³²⁵ Even in these cases, courts defer, conveying something between "near indifference" to simple respect to "substantial deference."³²⁶ In any event, the specific features of the agency action shape the "fair measure of deference" that courts choose to give.³²⁷ The question in any such case is whether the agency's interpretations bear any of the hallmarks of authority and expertise worthy of consideration.

I accordingly propose here a framework for judicial interpretation of a statutory provision that is separate but intertwined with a general regulatory regime in which Congress has delegated administrative or lawmaking responsibilities to an agency. The occasion for this kind of judicial review would be, as in *Aereo*, a dispute between private parties about the applicability of an ambiguous provision to a novel technology otherwise regulated by the agency. The agency's interpretation would be entitled to consideration to the extent it has authority to interpret a significantly related statutory provision.³²⁸

Under the approach I propose here, the judicial inquiry about how far the public performance right reaches would not begin and end with an analysis of the Transmit Clause or related provisions in the Copyright Act. Courts also would as a matter of course consider whether the Copyright Office or the FCC has determined whether a new video distribution technology is too unfamiliar (too disruptive) to fall within the ambit of the compul-

322. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283–84 (2d Cir. 2012).

323. *Id.* Or consider a decision from just this past term in which the Court, in determining the reach of a provision in the Federal Labor Standards Act, gave considerable consideration to the Department of Labor's approach to "similar" concerns even though it was not a party to the litigation. *Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513, 517–18 (2014); *id.* at 520 (Sotomayor, J., concurring) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

324. *United States v. Mead*, 533 U.S. 218, 228 (2001).

325. *Id.* at 227.

326. *Id.* at 228 (quoting *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389–90 (1984)) (internal quotation marks omitted).

327. *Id.* Courts look "to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of [its] position." *Id.* (footnotes omitted) (citing *Skidmore v. Swift*, 323 U.S. 134, 139–40 (1944)).

328. *See supra* Part III.B.

sory licensing, must-carry, retransmission consent, or program access laws—or, in the terms on which the *Aereo* court relied, whether those agencies have decided whether video streaming is like cable or not.

Attending to all of the public law of video distribution—legislation and agency action in the field—would best effectuate congressional intent. After all, the governing statutes reflect Congress’ decision that the balance of the diverse interests in the market for video programming distribution ought to be resolved in the first instance by the Copyright Office and the FCC. Legislators concluded that those agencies are best situated to assess the efficacy of current law in light of new innovations. It charged those agencies with the responsibility of keeping abreast of changes in the market, reporting those findings to Congress, and promulgating binding regulations when necessary to effectuate legislative intent. These are the very kinds of regulatory interventions to which the Court has pointed to justify routine judicial deference to agencies.³²⁹

Courts of general jurisdiction do not have the same claim to expertise or institutional authority under these circumstances.³³⁰ Nor can courts administer the careful policy balance embodied in video distribution law in the way that those agencies do on a case-by-case basis. Of course, courts have an important role to play. If neither Congress nor the pertinent agencies have determined (or can agree on) how or whether any provision applies to a particular dispute, they should employ the full sweep of interpretive tools to make sense of the law at issue as they normally would—that is, as the majority and dissent did in *Aereo*. Courts in these cases would do so based on the assumption that they are the first to address the question generally or that, in their protracted silence, Congress and the agencies expect as much from the courts.³³¹ In this regard, my proposal does nothing to diminish public law interpretation by courts.

But when the Copyright Office or the FCC has determined that a new technology is too disruptive to justify applying a related provision in the Copyright Act or the Communications Act,³³² as they have here, courts

329. See *Skidmore*, 323 U.S. at 139.

330. Compare courts of general jurisdiction to the various specialized courts, including the Federal Circuit Court of Appeals and the United States Tax Court. See also *Ass’n for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107, 2120 (2013) (Scalia, J., concurring) (disavowing portion of majority’s opinion in patent case that addressed the “fine details of molecular biology” because he could not “affirm those details” on the basis of his personal knowledge or belief).

331. Then again, it is unlikely that sudden technological disruptions and shifts in the market like the one the United States is experiencing today for video distribution will remain unaddressed by Congress or agencies. Congress is considering at least two bills that would be addressed directly to online video streaming. See *supra* notes 47–48 and accompanying text.

332. See, e.g., *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283–84 (2d Cir. 2012) (considering, and then giving deference to, the Copyright Office’s interpretation of 17 U.S.C. § 111(d)’s compulsory licensing scheme).

ought to defer to or at least consider that prior agency interpretation, apart from whether it would produce a different result. In this regard, my proposal would inject a degree of humility and discipline to the interpretive endeavor that to this point has been sorely missing in this legislative field.³³³ More generally, it would be a corrective to the sense of interpretive exceptionalism in judicial interpretation.

As it relates to judicial review of disputes concerning the application of the public performance right to online video streaming, my proposal would require courts to make several inquiries. Courts should take into account whether the Copyright Office or the FCC has considered whether the emergent technology is covered by compulsory licensing, retransmission consent, must-carry, or program access laws before proceeding to an analysis of the scope of broadcasters' public performance rights. If neither agency has spoken on the matter, I propose that courts engage in a *de novo* analysis of the applicability of the public performance right as they would a provision that no single agency has the responsibility of administering or implementing. If, however, the Copyright Office or the FCC has indeed determined one way or another how or whether a corollary provision applies to the new technology at issue, I would require courts to defer to that agency's interpretation as a matter of course.³³⁴

IV. CONCLUSION

Online video streaming applications have turned the traditional broadcast model inside out. Users today control what and how they watch video programming. These services are so different today from what existed just a generation ago that, until a divided Supreme Court decided the matter last term, courts did not agree on how such services square with existing law. Courts were uncertain, for example, about whether the new technologies are sufficiently novel not to be covered under the public performance right, a provision that Congress included in the 1976 Copyright Act specifically to address the unique political economy of cable retransmission of broadcast programming.

Today, at a time when so much in the market for internet-based applications and services is contested, I argue here that courts should be far more careful in their application of the public performance right to disruptive technologies like online video streaming than they have been. Instead, they should defer to the agencies to which Congress has delegated the authority

333. *See supra* Part I.D.

334. This deference could not be any greater than what is required under *Chevron*, but I do not offer here any firm proposal on the level of deference to which agencies would be entitled under these circumstances. I leave this question to a future project.

to interpret interacting provisions under the Copyright Act—that is, to all of the public law that Congress has set in motion. Courts, of course, should continue to be at their most searching when they are asked to interpret a provision that they have the authority to define in the first instance. But they also should be far more careful when they are asked to make sense of a provision in a complex legislative field for which Congress has given to agencies the primary responsibility of updating and implementing during dramatic times of change.